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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO.

ORIGINAL

83-6397

WILLIAM GIBBS HYMAN,

Petitioner,

-versus-

DANIEL R. McLEOD, SOUTH CAROLINA ATTORNEY GENERAL,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE

SUPREME COURT OF THE SOUTH CAPOLINA

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QUESTIONS PRESENTED FOR REVIEW

I.

Was a claim of ineffective assistance made when a defendant shows: (1) that he did not receive representation within the range of competence demanded of attorney's in criminal cases and (2) that counsel's failings impaired the presentation of his defense without regard to whether the outcome would necessarily have been different?

II.

Did the South Carolina Courts err in excluding at Petitioner's Post Conviction Relief trial the testimony of a juror who had been excused at trial for his opposition to the death penalty, and who was prepared to testify at the Post Conviction Relief trial that he could have considered imposition of the death penalty, and could vote to impose it, even though he was generally against the death penalty, but that he was never asked questions at trial which would have elicited these answers.

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SUPREME COURT OF THE UNITED STATES

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NO.

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DANIEL R. McLEOD, SOUTH CAROLINA ATTORNEY GENERAL,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE

SUPREME COURT OF THE SOUTH CAROLINA

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of South Carolina entered in the above styled case.

OPINIONS BELOW

The opinions of the Supreme Court of South Carolina denying Petition for Writ of Certiorari to review the action of the Post Conviction Relief trial court judge, and in denying a rehearing on its decision to deny Petition for Writ of Certiorari are not reported. These decisions are appended hereto at 2A and 3A.

JURISDICTION

The opinion of the Supreme Court of South Carolina denying Petition for Writ of Certiorari was entered on December 5, 1983. A timely petition for rehearing was

denied on January 10, 1984. This Court has jurisdiction to review the judgment below pursuant to 28 USC § 1257 (3).

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are the Fourteenth, Fifth, Sixth, and Eighth Amendments to the United States Constitution. These provisions and the South Carolina Death Penalty Statute, §16-3-20, et. seq. of the South Carolina Code of Laws, 1976 as amended, are set forth verbatim in an appendix, infra, at page 7A.

STATEMENT OF THE CASE

This is a case in which a South Carolina citizen has been sentenced to death in the electric chair. The record of his trial as amplified by his Post Conviction Relief record clearly shows that he in effect had no assistance of counsel at all. Essentially nothing was done that Mr. Hyman, an eighth grade drop out, could not have done himself from his jail cell. His lawyers did none of the things a lawyer should do. They made no motions; they in effect objected to nothing; they did not ask the Court for any jury instructions; nor did they except to the Court's jury instructions. While they did address the jury, Petitioner asserts he could have done at least as well through his own grasp of the factual and legal issues involved.

In his Order, the Post Conviction Relief hearing judge concisely stated the facts surrounding the initial crime as follows:

> On the night of March 24, 1979, the Applicant and four other persons travelled from North Charleston, South Carolina, to the home of two elderly men, Teagus and Collins Griffis, in Ravenel, South Carolina. They intended to rob the two man either through the use of deception or violence. They carried a shotgun and ammunition to accomplish their purpose. Applicant's wife and Susan Allday knocked on the door of the trailer, but were unable to entice the occupants outside. Thereafter, Allday, Robert Hinson and the Applicant, went back to the trailer door. It was opened by the occupants, and one of the Griffis brothers shot and seriously wounded Hinson. A general melee ensued. Collins Griffis was struck on the head several times, blood was splattered throughout the trailer, and Teagus Griffis was shot in the chest with a shotgun and died. The Applicant

> and the other participants were arrested and charged with murder and armed robbery on or about April 1, 1979. The Applicant's family retained Mr. Demetrious J. Stratos to represent the Applicant and his wife. Mrs. Hyman subsequently obtained other counsel. On July 9, 1979, Mr. Stratos informed Judge Clyde Elztroth that Mr. Hyman wished to have him relieved as counsel. Mr. Hyman stated upon questioning: 'I just don't believe that Mr. Stratos is up to date on the law.' The Motion was denied and the Clerk of Court was instructed to appoint an [additional] attorney for the Applicant. Mr. Landon Louthian was the second attorney appointed to represent the Applicant. Prior to the trial, the Solicitor offered Applicant a plea bargain whereby the State would abandon its request for the death penalty in exchange for a guilty plea. Mr. Stratos and Mr. Louthian advised the Applicant that it would be in his best interest to accept the plea bargain. The Applicant refused, and the Court was informed of this fact. The case proceeded to trial.

The other operative facts are that on July 9, 1979, Mr. Stratos received formal notice that the Circuit Solicitor intended to seek the death penalty. The trial of this case commenced on October 8, 1979, and concluded with a sentence of death on October 12, 1979. This sentence and conviction were appealed to the South Carolina Supreme Court, which affirmed both State of South Carolina v. Hyman, 281 S.E. 2d 209 (S.C. 1981). A petition for a Writ of Certiorari was filed with this court, which was later denied. Petitioner filed a Petition for Post Conviction Relief in the South Carolina State Courts, which was heard from November 29 through December 3, 1982 in Charleston, South Carolina. An order was issued denying Mr. Hyman's petition for Post Conviction Relief on March 8, 1983. Petitioner's Application for a Writ of Certiorari to the South Carolina

Supreme Court was denied by the South Carolina Supreme Court on December 5, 1983.

The central, crucial factual and legal issue before this Court on this Petition for a Writ of Certiorari, is whether or not the attorneys for the Petitioner at trial rendered the effective assistance of counsel guaranteed by the United States Constitution.

The statement of facts will, after an introductory description of Mr. Stratos, Mr. Louthian, and their respective roles in this litigation, follow the general factual analysis set forth by the Fourth Circuit Court of Appeals in Coles v. Peyton, 389 F. 2d 244 (4th Cir., 1968). There is no claim made here that counsel lacked sufficient time; rather, it is the utilization of the time which is at issue.

BACKGROUND OF MR. STRATOS

On April 1, 1979, when Mr. Stratos first saw this Petitioner as a client, and through his trial, Mr. Stratos did not keep office hours, did not have an office as such, but instead operated out of his home, and occasionally another home in North Charleston. (PCR TR 37-39) (All references to the Record before the South Carolina Supreme Court in their denial of Petitioner's Application for Post Conviction Relief shall be referenced as "PCR TR...". References from his original trial transcript shall be referenced as "TR...". References to the attached Appendixes shall be referenced as "App...".)

Mr. Stratos was practicing law at that time semi-privately and stated, "In the past seven years, I have

practiced as little as I can." (PCR TR 259) Mr. Stratos had a copy of the 1962 South Carolina Code, but not a copy of the revised 1976 Code which contained the Death Penalty Statute under which Petitioner was tried. (PCR TR 39) He did not have copies of the South Carolina Reports, the Southeastern Reporter, and did not subscribe to the Smith's Advance Sheet Service of the South Carolina Supreme Court. (PCR TR 40) While he did testify that he had access to such books, he stated that he never utilized such access.

He testified that he did not have a file in this case as such, and whatever documents he had, he gave to Mr. Louthian. (PCR TR 40-41) Mr. Louthian testified that after he had been appointed to represent the Petitioner, he asked Mr. Stratos if he could look through his file. Mr. Louthian was handed a copy of the indictment out of Mr. Stratos' pocket, and Mr. Stratos replied that: "That was it". (PCR TR 944-955)

Three experienced, well respected members of the bar (including one past president of the South Carolina Bar) testified as an offer of proof that Mr. Stratos was not competent to try any serious criminal case.

MR. STRATOS' ROLE IN THE CASE

On July 9, 1979, after first denying Petitioner's motion to relieve Mr. Stratos, the hearing Judge instructed the Clerk of Court to appoint additional counsel to assist Mr. Stratos, and Mr. Landon Louthian was so appointed. Mr Louthian testified that Mr. Stratos was in charge of the case, because Mr. Stratos had been involved in it longer. (PCR TR 948, 973, and 987) Mr. Louthian, when asked whether

or not he had done any legal research into what degree of opposition to capital punishment was necessary so that a juror could be excused, stated his understanding of his role.

> No sir, I didn't do any. I don't know what, if any, Mr. Stratos did. Let's bear in mind that he was the chief counsel, and I was just assisting him along. And I didn't know a whole lot of background on anything other than just to refresh my memory on what constituted murder and housebreaking and armed robbery and those things. (PCR TR 973)

Yet again, when questioned concerning whether or not he had conducted any research into the background of a testifying co-defendant, for cross-examination and impeachment purposes, Mr. Louthian stated,

> No, sir, I had told Mr. Stratos earlier in the case, that it was his case, and that he was Chief Counsel, and that whatever he wanted me to do as far as legwork or interviews, anything, just to let me know, and I would endeavor to do it, or see that it got done. And he never made any particular demands on me for any of these things that you have been asking. (PCR TR 987)

There is no question but that Mr. Stratos was chief counsel and Mr. Louthian's role was a limited one.

CONFERENCES WITH CLIENT IN ORDER TO ADVISE HIM OF HIS RIGHTS, TO EXPLAIN THE LAW TO HIM, AND TO ELICIT MATTERS OF DEFENSE, AND TO ASCERTAIN THAT POTENTIAL DEFENSES ARE UNAVAILABLE

Mr. Stratos, who was chief counsel, received formal notice that the Prosecutor was going to seek the death penalty on July 9, 1979, and on that date he also, at the request of the Petitioner moved the court to be relieved as counsel. Mr. Stratos testified, "I did not go to see him for approximately two months after he got up and made the

statement that he didn't want my services any more, that I didn't know anything, so I wasn't interested in talking to him". (PCR TR 42-43) He also testified, "I didn't feel that friendly towards him". (PCR TR 44)

This is borne out by the testimony of Captain Sprague, the Charleston County Jailer, who produced the records of visits by attorneys to the jail. It was stipulated by the parties that the jail records show that from July 5, 1979, until the end of the trial, October 12, 1979, Mr. Stratos made two visits to the Charleston County Jail, and Mr. Louthian one. (PCR TR 31; PCR TR 1011-1012) Mr. Stratos, after he was advised by the State that they were seeking the death penalty, and after Petitioner told him that he would not plead guilty, testified, "I don't know that I did anything". (PCR TR 56-57)

The explanation to Petitioner of the law involved, and of the desirability of accepting the State's plea bargain, was crucially important in this case. Mr. Louthian testified that they advised Mr. Hyman that if he was merely present and someone else committed a murder, he was equally guilty (PCR TR 966), and he also testified that he was not sure at all the Petitioner understood the law as, "He was a little vague on a lot of things." (PCR TR 967).

Bearing out the fact that Petitioner was never adequately explained the law, is Petitioner's testimony at the Post Conviction Relief trial:

Q. Did Mr. Stratos ever explain to you the law of criminal agency, concert, criminal concert of action, the law of conspiracy?

A. No sir. Mr. Stratos didn't explain those things.

Q. Has that ever been explained to you?

A. You have - you and Miss Stirling both have talked to me. (PCR TR 806)

FACTUAL INVESTIGATION

The principal evidence at trial against the Petitioner was that of his testifying co-defendants, Hinson, Midgett and Allday; the witness Coulston, who generally testified that Petitioner admitted he had killed a man and asked Coulston to provide him with a false alibi; and the surviving victim, Collins Griffis.

Mr. Stratos testified that early in his investigation, apparently in April of 1979, he visited Hinson, Allday and Midgett in the Charleston County Jail. However, he only gave them the advice that if nobody gave any statements to the State, the State could not prove a case against them. At no later time did he talk to these three witnesses. (PCR TR 51-52) Mr. Stratos further testified that while he attended a preliminary hearing, he did not remember whether there was a court reporter present, speculated that perhaps an attorney for a co-defendant had made a recording, testified that he had never asked for or seen a transcript of what had occurred at the preliminary hearing, admitted that he made no notes except mental notes, and testified that he did not remember the name of the witness or witnesses who testified. (PCR TR 54-55)

Mr. Stratos testified that he knew that Mr. Coulston was going to be a witness. He then admitted that he did not talk to Mr. Coulston prior to the trial and gave no thought to obtaining character witnesses to impeach Coulston. Mr. Louthian testified that he did not even know

Coulston was going to be a witness, and he didn't recall hearing his name mentioned anywhere along the line. Mr. Louthian testified that he was familiar with Mr. Coulston's reputation and he would have been able to present witnesses to testify to Coulston's bad character as it related to truth and veracity. Further, in Mr. Louthian's opinion, Coulston would have needed assistance from law enforcement officers to have gotten a pardon (PCR TR 977-978), which he had been given for an earlier murder conviction and which trial counsel was not allowed to question the witness about, even as to its having been granted in return for his testimony in Petitioner's trial. The pardon was applied for and granted after Coulston had agreed to testify for the State. (TR 309-310) No effort was made by either counsel to get the pardon records of Mr. Coulston, for impeachment purposes or otherwise, although Mrs. Hyman's attorney successfully was allowed to question Mr. Coulston as to the timing of his pardon in her separate trial for murder. (PCR TR 1142, et. seq.)

Coulston testified, to devastating effect, during Petitioner's trial. (TR. 307-312)

The remaining crucial witness was Collins Griffis, the surviving victim. Neither Mr. Stratos nor Mr. Louthian had ever talked to Mr. Griffis. (PCR TR 86) The Prosecutor had an open file policy, both prior to, and at any point during the trial. (PCR TR 628-629) Mr. Stratos testified that he had seen an Incident Report in the Prosecutor's file which contained a statement by the investigating officer that, "In further talking with the subject [Griffis], he also stated that one of the women grabbed his

brother's shotgun that was by the door and she shot his brother with his own shotgun". (emphasis added) (PCR TR 1022) Mr. Stratos said that he did not think this would have been of any use. (PCR TR 63-64) Mr. Louthian, however, testified that while he did not recall ever having seen that incident report before, responded when asked if such a statement would have been of any use: "I think it would, because it was Mr. Hyman's contention all along that he didn't shoot him, that he thought Sue Allday had done it". (PCR TR 895-896)

The Prosecutor's open file policy would have permitted counsel to examine the file and make copies of its entire contents. (PCR TR 628) Mr. Stratos and Mr. Louthian testified that they went through the Petitioner's prosecution file, but the only information obtained from it apparently were the copies of statements of the three testifying co-defendants, and the knowledge gained by Mr. Stratos, but not Mr. Louthian, that Coulston was going to be a witness.

Contained in the file, in addition to the three co-defendants' statements were at least the following:

A. Supplemental Incident Report, which contained the statement that the surviving victim stated a woman was the one who shot his brother. (PCR TR 1022)

B. Transmittal letter from the Charleston County Police Department to the Federal Bureau of Investigation, in which the factual presentation was that the fatal shot was fired as soon as the door to the trailer was opened. (PCR TR 1019)

C. Statement of Carl Lindgren, which contained the statement that Hyman had told Lindgren that Sue Allday had shot and killed the victim. (PCR TR 1013)

D. A transcription of Petitioner's interview by the police officers, at the time of his arrest, in which he gave false exculpatory statements (PCR TR 1034)

E. Transcription of interview with Doris Hyman, Petitioner's wife, in which the interviewing officer indicated that Coulston would not be of much assistance as an alibi witness since he was on parole, and by implication was subject to their control. (PCR TR 1061)

This information would have been useful to impeach Coulston. It would also have been crucial support on the "trigger man" issue since it would have placed before the jury, in the examination of Collins Griffis, his previous statement that a woman apparently was the one who shot and killed his brother. In the Lindgren statement, a prior statement, consistent with Hyman's statement at trial, that it was not he who fired the fatal shot, would likely have been admissible to meet the issue of the allegation of recent fabrication. None of this was done, because counsel did not have these documents.

Neither trial counsel conducted any jury research. The total extent of investigation into the jury was obtaining from the Clerk of Court's office the standard computer print-out, which contains the basic information of name, address, employment (often outdated information), race and birthdate.

At her trial, Mrs. Hyman testified that Sue Allday admitted to her that Allday had fired the fatal shot. (PCR TR 1072, et. seq.) Mrs. Hyman was not a witness at Mr. Hyman's trial. Mr. Louthian testified that he did not seek her testimony(PCR TR 960) and, ". . . for some reason, D.J. [Stratos] didn't want her as a witness". (PCR TR 989) Mr. Thomas Bolus, who represented Mrs. Hyman, testified that

neither Mr. Stratos nor Mr. Louthian ever approached him concerning the possibility of Mrs. Hyman testifying in her husband's behalf. (PCR TR 305)

The Petitioner was sent to the South Carolina State Hospital for a mental examination, but counsel did not talk to any of the doctors at the State Hospital, did not get a copy of the State Hospital records, and did not give any consideration to independent psychiatric or psychological witnesses. (PCR TR 115-116) Dr. Ada Kirkman, a psychiatrist, (at the request of current counsel) examined Mr. Hyman, and expressed an opinion at his Post Conviction Relief hearing that, at the time of this offense, his capacity to appreciate the criminality of his conduct, or to conform his conduct to the requirements of the law, was substantially impaired. (PCR TR 336) Additionally, she testified that in her opinion at the time of the crime, he was under the influence of mental or emotional disturbance. (PCR TR 334) These, under §16-3-20 (C)(b)(2) and (6), of the South Carolina Code of Laws, 1976 as amended, are statutory mitigating circumstances, and her opinion would have been evidence to support the first, which was not requested, but which was charged at the trial, sua sponte, and would have required the submission of the second, which was neither requested nor charged.

Petitioner testified in the penalty phase of the trial. (TR. 464, et. seq.) The Post Conviction trial judge found, "The record also shows that little last minute preparation was done to prepare Applicant to testify". (App 4A, 41) Mr. Stratos testified that after the guilty verdict, and before the penalty portion of the trial

started, he did not talk to Applicant at all. (PCR TR 112) Mr. Louthian testified that neither of them knew what he would say. (PCR TR 993) Despite this, the record of the trial itself shows that Mr. Stratos conducted Mr. Hyman's examination during the penalty phase. (TR. 464)

As the record of the trial shows, Mr. Hyman was cross-examined to good effect, concerning false statements made to Detective Minter of the Charleston County Police. (TR. 470-471) Mr. Louthian testified that if he had known of these false exculpatory statements made by Mr. Hyman, which were contained in the Prosecutor's file, he could have made good use of them and they would have been important to prepare Mr. Hyman for cross-examination. (PCR TR 899) Neither lawyer utilized these statements to help prepare him to testify in the penalty portion of this death penalty trial during which his very life was on the line.

LEGAL RESEARCH

Mr. Stratos testified that he did not read the South Carolina Death Penalty Statute prior to the commencement of the trial, and only first read it, at the urging of two lawyers who were not involved in this case, in the period between the guilt and penalty phase immediately before the commencement of the penalty phase. (PCR TR 90-92) Further, Mr. Stratos said he did no legal research generally, and did not read any South Carolina or United States Supreme Court decisions concerning the death penalty. (PCR TR 97-98) Additionally, he did not discuss the problems incident to a death penalty case with any other attorneys, with the possible exception of what he termed a vague recollection

that he perhaps talked to a prosecutor in Georgetown County. (PCR TR 99)

Likewise, Mr. Louthian testified that he did not recall having read any South Carolina Supreme Court, Federal Court or United States Supreme Court cases prior to the trial. (PCR TR 975-976) Mr. Louthian and Mr. Stratos had not read, and were not familiar with the principles of, Witherspoon v. Illinois, 391 U.S. 510 (1968). Accordingly, trial counsel's failure to participate appropriately in voir dire, is explained. The trial transcript reveals the following voir dire process: Thirty-one jurors were called. Four were excused because they had problems with a lengthy trial. Of the remaining 27 jurors, trial counsel asked no questions at all of 21. Four jurors expressed scruples against the death penalty. Trial counsel not only asked no questions of any of these four jurors, but also, when the first such juror expressed her scruples, Mr. Stratos said, "That automatically excludes her, doesn't it, Judge?" (TR 558) Of the jurors who were asked any questions, one was asked one question, two were asked three questions, one was asked four questions, and one was asked seven questions.

At the trial of the murder case, juror Manigault Jenkins was excused for opposition to the death penalty, the attorneys for the defendant asking no questions. (TR. 500-502) At the hearing for Post Conviction Relief, this juror was tendered as a witness and the Post Conviction trial judge refused to allow the introduction of his testimony. Applicant presented an offer of proof that if Mr. Jenkins were allowed to testify, he would state that if he had been asked, he would have stated that his opposition

to capital punishment was not unequivocal, and that he would have been able to consider, and perhaps could have voted under proper circumstances to impose, the death penalty. (PAA. 6A 501-501)

Mr. Stratos and Mr. Louthian testified they had not read the decision of Lockett v. Ohio, 438 U.S. 586 (1978). Accordingly Judge Singletary was not requested to charge and counsel did not except to his failure to charge the "triggerman" proposition, even in response to the jury's question on this very point. (While deliberating on punishment, the jury returned to the courtroom and asked the Trial Judge, "Do we have to prove that he did the actual killing?" TR. 528).

The only indication of any legal research that can be found in this record appears to be a copy of the page of Black's Law Dictionary, which defines the word "robbery" from Mr. Louthian's file (PCR TR 1201), and a copy of one page of the South Carolina Code defining "burglary". (PCR TR 1201) In short, no appropriate legal research whatsoever was done by either attorney in preparation for Petitioner's death penalty trial.

ATTITUDE OF MR. STRATOS

Two concerned trial lawyers and a former prosecutor all testified as to the lackadaisical and jocular attitude of Mr. Stratos and his lack of concern with the likelihood that his client would receive a death sentence. (PCR TR 574, 601, 605) Mr. William Runyon, a Charleston trial attorney, testified that Mr. Stratos said he was not worried during the trial because, as he told Mr. Runyon,

"they would never execute Mr. Hyman because he [Mr. Stratos] wasn't competent to handle this kind of trial". (PCR TR 291)

QUESTIONS RAISED BELOW

The questions presented to this Court were presented to the Court below in the amended petition for Post Conviction Relief, which is appended hereto, as Appendix 5A. These appear as grounds A, B, C, and Q, as it relates to ineffective assistance of counsel and to the appropriate standard to be applied, which is Question One in the instant Petition for a Writ of Certiorari, and in Grounds A, B, and E as it relates to the excusing of the scrupled juror Jenkins, which is Question Two in this Petition.

The Post Conviction trial judge dealt with the issue of the degree of prejudice required in an ineffective assistance of counsel case in his order denying Post Conviction Relief. (App 4A, 23-45)

The Post Conviction Relief trial judge dealt with the question concerning the excusing for cause, and the non-existant voir dire examination of the juror Manigault Jenkins, commencing at page 498 of the Post Conviction Relief trial transcript, through page 502. (App 6A)

REASONS FOR GRANTING THE WRIT

This Court should grant Petitioner's Writ of Certiorari in order to review the decision of the South Carolina Supreme Court, inasmuch as their decision to deny a Petition

for Writ of Certiorari to review the decision of the State Court Post Conviction Relief judge would allow the law in the case concerning a substantial federal question to be in conflict with applicable decisions of this Court. Additionally, there exists a conflict among the Circuit Courts of Appeal as to the appropriate standard to be applied in evaluating claims of ineffective assistance of counsel in criminal cases and this Court currently has before it similar questions raised in United States v. Cronic, (82-660) and Strickland v. Washington, (82-1554).

I

> A CLAIM OF INEFFECTIVE ASSISTANCE IS MADE WHEN A DEFENDANT SHOWS: (1) THAT HE DID NOT RECEIVE REPRESENTATION WITHIN THE RANGE OF COMPETENCE DEMANDED OF ATTORNEYS IN CRIMINAL CASES AND (2) THAT COUNSEL'S FAILINGS IMPAIRED THE PRESENTATION OF HIS DEFENSE WITHOUT REGARD TO WHETHER THE OUTCOME WOULD NECESSARILY HAVE BEEN DIFFERENT

The South Carolina Supreme Court refused to review Petitioner's Post Conviction Relief claim, in spite of the overwhelming evidence of ineffective assistance of counsel. Petitioner's Post Conviction Relief trial judge found that

> Applicant has failed to demonstrate any specific prejudice attributable to errors of omission or commission committed by trial counsel. Applicant's conviction and sentence were not the result of any deficiencies on the part of trial counsel . . . I find that Applicant has failed to establish that trial counsel's representation fell outside the normal range of competency demanded of criminal lawyers, and

accordingly, I find that trial counsel's representation was effective. (App. 4A, 44-45)

In so finding, Judge Morris failed to apply proper standards to the determination of effectiveness and applied an improper standard for the showing of prejudice.

A. The Sixth Amendment is Violated By Representation That Falls Outside The Range of Competence Demanded of Attorneys in Criminal Cases

The Sixth Amendment to the Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S Const. Amend. VI. The theme of this Court's Sixth Amendment decisions is that a lawyer is a precondition to a fair trial, not simply one element of a fair trial. Cuyler v. Sullivan, 446 U.S. 335 (1980). Developments since Gideon v. Wainwright, 372 U.S. 335 (1963), firmly establish that vindication of the right to counsel is not dependent upon whether the proceeding is characterized as fundamentally unfair, but on whether inadequate counsel violated the accused's Sixth Amendment rights.

1. The Basic Functions of Counsel in Criminal Proceedings Have Been Conceived and Developed in The Right to Counsel Cases Decided By The Court Under The Sixth Amendment

The principal functions of counsel in the criminal process have been established by the Court in right to counsel cases. The repeated theme of these decisions is that counsel serves "as a guide through complex legal technicalities" for the lay person, United States v. Ash, 413 U.S. 300, 307 (1973), and as a counterweight in the

adversary system to the creation of a professional prosecuting official. Id. at 309.

Counsel enables the accused to assess the charges and potential defenses so that the defendant may intelligently understand the options available to him. Hamilton v. Alabama, 368 U.S. 52 (1961). Counsel does so by applying a specialized ability to integrate a knowledge of the law with an assessment of the relevant facts to determine how the accused can best present his defense. Counsel also protects the accused against an erroneous or improper prosecution by vigorously examining witnesses, probing for evidence, developing facts, making legal arguments and generally requiring that the prosecution be put to its legal proof. Coleman v. Alabama, 399 U.S. 1 (1970). To protect the accused adequately, "the guiding hand of counsel" must be available "at every step in the proceedings against him." Powell v. Alabama, 287 U.S. 45, 69 (1982). See also Estelle v. Smith, 451 U.S. 454, 471 (1981); Coleman v. Alabama, 399 U.S. at 7; United States v. Wade, 388 U.S. 218 224-226 (1967).

Consequently, counsel is not a supplement to other constitutional rights; he is an indispensable figure charged with ensuring that all other constitutional and procedural protections afforded the accused are fully preserved. The right to counsel is sui generis; "there is no right more essential than the right to assistance of counsel . . ." Lakeside v. Oregon, 453 U.S. 333, 341 (1978), because "it affects [an accused person's] ability to assert any other rights he might have." Schaefer, Federalism and State Criminal Procedure, 70 Harv. L. Rev. 1, 8 (1956).

Besides performing an essential role for the accused, defense counsel's participation in the criminal process is critical to the integrity and fairness of the adversary system. Brewer V. Williams, 430 U.S. 387, 398 (1977); United States v. Morrison, 449 U.S. 361, 364 (1981). The adversary system assumes the presence and active involvement of three participants -- the judge, prosecutor and defense counsel -- who will discharge their respective responsibilities conscientiously and effectively. United States v. Ash, 413 U.S. at 309. See also Johnson v. Zerbst, 304 U.S. 458, 462 (1930); Gideon v. Wainwright, 372 U.S. at 344.

In sum, the dual functions of counsel underscore the critical role of the effective assistance of counsel in the criminal process. As we show below, they also suggest the standards by which claims of ineffective assistance should be determined.

2. Effective Counsel Must Discharge Certain Basic Duties That Derive Directly From the Functions He Fulfills in the Criminal Process

At the outset, we note the parameters established by the decisions of the Circuits and the implications of the Court's Sixth Amendment cases. On one hand, the basic purposes of the Sixth Amendment guarantee of counsel must require more than the mere formal appointment or physical presence of counsel. See Holloway v. Arkansas, 435 U.S. 475, 489-90 (1978); Avery v. Alabama, 308 U.S. 444, 446 (1940); White v. Ragen, 324 U.S. 760 (1945); Powell v. Alabama, supra. On the other hand, the Constitutuion does not require errorless counsel, Parker v. North Carolina, 397

U.S. 790, 797 (1970); McMann v. Richardson, 397 U.S. 759, 771 (1970), nor does it compel counsel to recognize and raise every conceivable claim or defense. Engle v. Isaac, 456 U.S. 107, 134 (1982). Rather, counsel must provide assistance "within the range of competence demanded of attorneys in criminal cases." McMann v. Richardson, 397 U.S. at 771. Accord Tollett v. Henderson, 411 U.S. 258, 266 (1973). This encompasses the level of competency provided by attorneys with knowledge, skill, judgement and diligence in the sound practice of criminal law. See also Cooper v. Fitzharris, 586 F.2d 1325, 1330 (9th Cir. 1978) (en banc), cert. denied, 440 U.S. 974 (1979); Moore v. United States, 432 F.2d 730, 736 (3d Cir. 1970) (en banc).

Thus far, the Court has not fleshed out the details of that responsibility; it has not formulated any list of specific duties for determining whether counsel has been reasonably competent. While an exhaustive list may not be appropriate, it should be considered that in representing a criminal defendant, trial counsel has three fundamental functions to perform:

First, without question, counsel must function as a zealous advocate of his client's cause.

Second, counsel must bring an informed grasp of the facts and law to his decision-making on the wide range of issues confronting the accused.

Third, it necessarily follows from counsel's role as advisor and "guiding hand" that an attorney "must make an independent examination of the facts, circumstances, pleadings and laws involved" in order to be in the position to exercise sound professional judgement for the accused.

VonMoltke v. Gillies, 322 U.S. 208 (1945) 721; Powell v. Alabama, 287 U.S. at 57.

For these reasons, the conclusion implicit in the Post Conviction Relief judge's order in Petitioner's case (that counsel was effective in that their efforts had not contributed to his conviction and sentence) is erroneous and misplaced. As shown, not only did counsel fail to operate as the zealous advocate anticipated by the Sixth Amendment, but also frequently behaved in opposition to Petitioner's interests; they obviously failed to do those things reasonably demanded of competent counsel in a criminal case.

The basic duties of reasonably competent counsel described above must be discharged at sentencing as well as at trial, particularly in capital sentencing proceedings. Gardner v. Florida, 430 U.S. 349, 358 (1977). Because of the critical nature of the sentencing determination, counsel's assistance is essential "in marshaling the facts, introducing evidence of mitigating circumstances and in generally aiding and assisting the defendant to present his case as to sentence." Mempa v. Rhay, 389 U.S. 128, 135 (1967). Accord Gardner, 430 U.S. at 360; Moore v. Michigan, 355 U.S. 155, 160 (1957); cf. Von Moltke v. Gillies, 332 U.S. at 721.

B. Relief Should Be Granted To A Defendant Who Demonstrates That Counsel's Serious Derelictions Impaired The Presentation Of The Defense, Though Not Necessarily The Outcome of the Trial and Sentencing

While this Court has not yet addressed the prejudice question in this context, it has indicated that only those violations that have "had [an] adverse impact upon the

criminal proceedings" warrant relief under the Sixth Amendment. United States v. Morrison, 449 U.S. at 367; cf. Avery v. Alabama, 308 U.S. at 452.

1. The Court below improperly applied an outcome-determinative standard of prejudice

The Post Conviction Relief trial judge, in his order, used an outcome-determinative standard of prejudice. (App. 4A, 17-18, 44-45) This test places an impermissible burden on a petitioner for Post Conviction Relief. This test also imposes a host of inapropriate and burdensome responsibilities on the reviewing courts and is inconsistent with the fundamental values underlying the Sixth Amendment.

First, it is evident that a focus on outcome will require courts to retry issues of guilt and penalty, inevitably forcing judges to trespass "upon what properly would have been the jury's province in weighing the truth or falsity of the evidence at the original trial." McQueen v. Swenson, 498 F.2d 207, 220 (9th Cir. 1983).

Second, such an inquiry is not only improper, but also highly speculative. A reviewing judge must necessarily conjecture about how a judge or jury might have reacted to certain evidence or testimony. United States v. Tucker, 716 F.2d 576, 589 (9th Cir. 1983).

This speculation reaches particularly unacceptable levels when counsel's failings, as here, have resulted in an impoverished trial record. When counsel has failed to investigate and prepare, it is unfair if not impossible to assess the impact that later unearthed information, first

presented in Post Conviction Relief hearings, would have had on the decision maker in the original proceedings. Cf. Holloway v. Arkansas, 435 U.S. at 590-591.

To admit that a conviction or sentence was the result of a breakdown in the process, but then to make relief turn upon a guess as to how that process might have functioned with effective counsel is to trivialize the central importance of the guarantee of adequate counsel to the proper functioning of the adversary process.

Third, the subjective and conjectural inquiries implicit in decisions based on the outcome-determinative test will necessarily prevent any principled consistency in determinations of effective assistance and will fail to provide sufficient guidance to either conscientious counsel or reviewing courts. This entire process does not approach the kind of "intelligent evenhanded application," Holloway v. Arkansas, 435 U.S. at 491, that is so essential for the elucidation of proper standards of attorney performance under the Sixth Amendment.

Fourth, an outcome-determinative test is unduly burdensome on the reviewing courts. In order accurately to assess the effect of counsel's failings on the outcome, a judge must evaluate the relative credibility of various witnesses and consider the strength of the physical or documentary evidence. An outcome-determinative test would compel the parties to present the entire case anew, without counsel's errors or omissions, in order to ensure a reliable decision as to what the proper outcome ought to be but for counsel's ineffectiveness. The burden on the courts would be inordinate.

The outcome-determinative standard is particularly inappropriate when claims of ineffective representation at capital sentencing proceedings are involved. Not only does a focus on result fail to ensure adequate protection of the defendant's legitimate interest in the character of a capital sentencing scheme, Gardner v. Florida, 430 U.S. at 358, but also it does not take into account the discretionary and highly sensitive nature of the capital sentencing decision. Whereas one judge or juror may consider the defendant's character and background insufficient to mitigate a murder, another judge or juror could easily come to the opposite conclusion. Sentencing always involves " a large area of discretion and doubts." Carter v. Illinois, 392 U.S. 173, 178 (1946); United States v. Grayson, 438 U.S. 41, 48 (1978). Barclay v. Florida, _____ U.S. _____, 103 S.Ct. 3418, 3424 (1983); id. at 3435. The outcome-determinative standard would require the courts to engage in fine-spun speculation on how a sentencer would exercise that judgment when faced with new information in mitigation that inadequate counsel failed to uncover.

For these reasons, virtually every Circuit that has adopted a test of prejudice within the framework of a reasonable competence standard has focused the inquiry solely on the impact of counsel's inadequacy upon the course of the proceedings rather than upon the conjectured outcome.[1] Under this view, a requirement of prejudice does not mean that the reviewing court must weigh the evidence for itself and conclude that "the defendant would have been acquitted but for counsel's blunders." Cooper v. Fitzharris, 586 F.2d at 1333; Harris v. Housewright, 697 F.2d 202, 212

(8th Cir. 1982); United States ex. rel. Green v. Rundle, 434 F.2d 1115-1116 (3rd Cir. 1970). It means instead that the court must determine whether the ineffective assistance had an adverse impact on or created a "flaw in the adversary process," McQueen v. Swensen, 498 F.2d at 218-219.[2] So far as the federal Circuits are concerned, therefore, the outcome oriented standard of prejudice is an anomaly articulated in only two Circuits -- the Second Circuit, which adheres to the universally condemned "farce and mockery" standard, and the District of Columbia Circuit, which wholly misinterpreted the source of its test.[3]

This Court's decisions in the Sixth Amendment area are plainly at odds with an outcome-determinative standard. No decision of this Court involving the Sixth Amendment right to counsel has ever intimated that outcome, as opposed to the effect on the defense, is the appropriate focus of inquiry. See, e.g., Cuyler v. Sullivan, 446 U.S. at 348-49; Holloway v. Arkansas, 435 U.S. at 489-91; Avery v. Alabama, 308 U.S. at 458 White v. Ragen, 324 U.S.760, 764 (1975). And a recent decision of this Court that canvasses the issue of prejudice in the Sixth Amendment context framed the inquiry solely in terms of whether the infringement "has had or threatens some adverse effect upon the effectiveness of counsel's representation or has produced some other prejudice to the defense." United States v. Morrison, 449 U.S. at 365. (emphasis added). The inquiry was conspicuously not whether the result of a criminal prosecution would have been different if the right to counsel had been properly afforded. See also Weatherford v. Bursey, 429 U.S. 545, 558 (1977).

In sum, an outcome-determinative test of prejudice is fundamentally at odds with this Court's decisions and the standards developed in the overwhelming majority of the Circuits. Any standard that has such fundamental flaws should be soundly rejected by this Court.

2. The Proper Test of Prejudice Requires A Petitioner To Demonstrate That Counsel's Serious Derelictions Impaired The Defense

The above discussion reveals the evident superiority of a standard of prejudice that focuses on the impairment to the defense caused by counsel's inadequacies. When defense counsel is ineffective, the representation of the defendant is "not a product of an adversary, but a flaw in the adversary process." McQueen v. Swenson, 498 F.2d at 218-19. This taint can only be neutralized by inquiring into "whether counsel's incompetence impaired [the] defense, not whether the defendant would have been convicted in spite of these errors." United States v. Tucker, 716 F.2d at 587.

The standard is sufficient to guard against baseless attacks on counsel. It first requires a showing that counsel's failings breached the basic responsibilities of reasonably competent counsel. Insignificant or insubstantial errors by diligent counsel would hardly serve to overturn a conviction or sentence. McMann v. Richardson, 397 U.S. at 711. Then there must be a showing that counsel's errors actually impaired the presentation of the defense. Avery v. Alabama, 308 U.S. at 452. Even if a petitioner could show impairment to the defense, the State could still establish that the denial of the right to effective assistance of counsel was harmless in light of the

entire record. See, e.g., United States v. Tucker, 716 F.2d at 588; Washington v. Strickland, 693 F.2d 1243 (5th Cir. 1982)

As at other points in the consideration of ineffective assistance claims, courts will necessarily have to retain flexibility in the application of this standard to specific cases. While considerations of prejudice do not lend themselves to categorical rules, there are several factors that should be considered in weighing the extent to which the defense was impaired in a particular case:

First, certain defects in counsel's representation are more basic than others because they deprive the defendant of the undivided allegiance of a partisan and zealous advocate. Since there has been a fundamental failing of counsel in such instances, the degree of prejudice required will be quite different than that necessary when there has been a momentary lapse in counsel's representation during trial.

Second, the pervasiveness of counsel's inadequacies must also be considered.

Third, the effect of counsel's failings that result in an impoverished record must be approached quite differently than other errors whose impact on the defense is more easily ascertainable.

Fourth, just "as the severity of the sentence [in a capital case] mandates careful scrutiny in the review of any colorable claim of error," Zant v. Stephens, _____ U.S. _____,103 S. Ct. 2733, 2747 (1983), so too do "capital cases demand special efforts by counsel and special sensitivity by courts to the impact of counsel's actions."

A fifth factor to consider is the nature and subtlety of the issues. Where the issue is guilt or innocence, a determination closely bounded by legal rules, the probable effect upon the defense of counsel's failure to locate witnesses or evidence may be undertaken with some degree of confidence. In contrast, in the highly discretionary area of sentencing, the extent to which counsel's inadequate preparation or investigation impaired the defense is much more difficult to assess.

The interplay of these factors may take on different meanings in the myriad circumstances confronted by courts. While none of the factors will be dispositive on the issue of prejudice, they should guide the courts in assessing whether the circumstances in a particular case are sufficient to merit relief under the Sixth Amendment.

C. Application of Appropriate Sixth Amendment Principles To The Record In This Case Convincingly Establishes That Respondent Was Deprived of the Effective Assistance of Counsel At His Trial and Sentencing Hearing

The application of the basic Sixth Amendment principles articulated above to the present case point unerringly to the conclusion that counsel was ineffective in every aspect of his trial.

First, the stakes were life or death.

Second, trial counsel early on withdrew as a zealous and active advocate for Petitioner after the motion to relieve him on July 9, 1979, and not only failed to maintain contact with Mr. Hyman, but was actively "upset" with him. Counsel's disassociation from Petitioner in this case rises to the level of being actively opposed to his wellbeing.

Counsel's attitude toward Petitioner's life and death predicament during trial was uncaring and even jocular. Petitioner had no one to act as the "guiding hand of counsel," and in fact was on his own when he had the right to believe he had representation. Petitioner would have become his own zealous advocate had he known he should and would have received far superior representation.

Third, trial counsel utterly failed, through either ignorance or neglect, to conduct any investigation of the facts in this case. A cursory reading of the documents in the prosecutor's file alone would have revealed a substantial factual possibility of laying fault for the actual shooting at the feet of Sue Allday as both a possible defense and certain mitigation. This crucial issue was not recognized, presented, or argued by trial counsel.

Fourth, counsel did no legal research whatsoever. Research would have, at a minimum, developed the legal importance of presenting the "triggerman" issue. No request to charge was made on this or any other issue and no objection to the judge's charge to the jury after their specific question on this very point. Counsel did not even read the South Carolina Death Penalty Statute until immediately prior to the sentencing phase.

Fifth, counsel conducted no jury investigation and asked no meaningful voir dire. Counsel totally misunderstood the legal effects of a scrupled juror ("That automatically excuses her, doesn't it Judge." TR 588), failed to make any efforts to rehabilitate any scrupled jurors, and asked no questions of jurors which could conceivably uncover bias or prejudice. Petitioner therefore

had no assistance of counsel in what should have been an effort to pick a fair and unbiased jury which would later decide whether he should die.

Sixth, the mitigation phase of the trial was a sham. Counsel wanted to waive the statutory 24 hour period between the verdict and penalty phase: "Your honor, let the record show that the two attorneys to Mr. Hyman waive it. However, Mr. Hyman does not waive it." (TR 430) Petitioner was totally unprepared for his testimony and counsel did not even inquire as to what he intended to say. Petitioner was therefore not prepared to meet effective cross-examination concerning false exculpatory statements made by him to police officers. None of Petitioner's friends, supporters, or family members were told the significance or meaning of the penalty phase and those who testified were utterly unprepared. Petitioner's mother and his closest sister were not even present as they thought the sentence was essentially decided. Further, counsel had renewed anger toward Petitioner as he had again tried to have counsel relieved and a mistrial granted. This attitude flies in the face of what the Sixth Amendment demands of counsel and culminated in desultory and rambling closing arguments, in which counsel even argued to the jury that one day Petitioner would be paroled, thereby suggesting to the jury that a death sentence is preferrable to his being released. Such an argument by the prosecutor would have been clear error, State v. Atkinson, 172 S.E. 2d 111 (S.C. 1970); State v. Brooks, 247 S.E. 2d 436 (S.C. 1978); State v. Goolsby, 268 S.E. 2d 31, cert. den. 449 U.S. 1037 (S.C. 1980), and certainly should be when his own lawyer makes it.

No investigation of psychiatric evidence was considered. The trial judge, sua sponte, had charged one mitigating circumstance, that "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired." §16-5-20 (C)(b)(6), South Carolina Code of Laws, 1976 as amended. It developed in his Post Conviction Relief hearing that further psychiatric testimony was readily available through investigation which would have supported the submission and argument of the first mitigating circumstance and would have required the submission of a second mitigating circumstance, that, "[t]he murder was committed while the defendant was under the influence of mental or emotional disturbance." §16-3-21 (C)(b)(2), South Carolina Code of Laws, 1976 as amended. Neither were requested by counsel and the second was not charged. Neither was argued to the jury. Counsel had not even read the list of possible mitigating circumstances until immediately prior to the penalty phase.

II.

THE SOUTH CAROLINA COURTS ERRED IN EXCLUDING AT PETITIONER'S POST CONVICTION RELIEF TRIAL THE TESTIMONY OF A JUROR WHO HAD BEEN EXCUSED AT TRIAL FOR HIS OPPOSIITON TO THE DEATH PENALTY, AND WHO WAS PREPARED TO TESTIFY AT THE POST CONVICTION RELIEF TRIAL THAT HE COULD HAVE CONSIDERED IMPOSITION OF THE DEATH PENALTY, AND COULD VOTE TO IMPOSE IT, EVEN THOUGH HE WAS GENERALLY AGAINST THE DEATH PENALTY, BUT THAT HE WAS NEVER ASKED QUESTIONS AT TRIAL WHICH COULD HAVE ELICITED THESE ANSWERS.

Manigault Jenkins was tendered as a witness in the Post Conviction Relief hearing to testify that if he had been asked on voir dire at trial, he would have testified that, while he was generally opposed to capital punishment, he could consider it, and, depending on the facts, would be able to impose it in a proper case. This testimony was crucial, because it would demonstrate that if trial counsel had properly prepared themselves on the law, and had appropriately questioned Mr. Jenkins, the juror would not have been excused for cause. Excusing a juror for opposition to the death penalty, who would not be Constitutionally excludable under Witherspoon v. Illinois, 391 U.S. 510 (1968) is reversible error in a death penalty case, and the death sentence cannot be executed regardless of the number of challenges which have been left unused by the prosecution. Mathis v. New Jersey, 403 U.S. 946 (1971), reversing State v. Mathis, 52 N.J. 328, 245 A. 2d 20 (1969); Bernett v. Illinois, Targa v. Illinois, 403 U.S. 947 (1971), reversing People v. Bernett, 45 Ill. 2d 227, 258 N.E. 2d 793 (1970); Whan v. Texas, 403 U.S. 947 (1971), reversing Whan v. State, 438 S.W. 2d 918 (Tex. Cr. App. 1969). In other words, there is no such thing as harmless Witherspoon error.

Rampant in Petitioner's case are repeated outrageous violations of Petitioner's right under the Sixth Amendment to be represented by effective counsel. Coles v. Peyton, 389 F. 2d 244, (4th Cir. 1968); Marzullo v. Maryland, 561 F. 2d 540 (4th Cir. 1977). This lack of adequate representation is also evident in trial counsel's treatment of Mr. Jenkins' testimony during voir dire. After the prosecutor had elicited Mr. Jenkins' general opposition to

the Death Penalty, Mr. Louthian said, "no questions," as he had with Counsel's all other scrupled jurors. (TR. 602) Counsel at Petitioner's Post Conviction Relief hearing were trying to place in the record the ease with which Mr. Jenkins could have been rehabilitated with relatively simple but knowledgeable questioning. The Post Conviction Relief trial judge's refusal to allow the introduction of this testimony foreclosed Petitioner from establishing not only substantial Witherspoon error, but also, and more appropriately, kept him from adding this testimony for consideration in support of his showing of the Sixth Amendment violation.

In South Carolina, one juror's refusal to vote for the death penalty results in a life sentence. Therefore, counsel's utter failure to ask one single question of this juror is extremely relevant, and the Post Conviction Relief trial judge erred in refusing to allow or consider this testimony.

CONCLUSION

Counsel's numerous inadequacies in this case repeatedly and substantially deprived Petitioner of his right to counsel under the Sixth Amendment to the United States Constitution. This Court should grant Petitioner his Writ of Certiorari to enable him to brief fully this issue so as to request that this Court reverse his conviction and sentence and remand his case for a new trial.

Allan R. Holmes

FOOTNOTES

1 With the exception of the Fourth and Sixth Circuits, every Court of Appeals requires the petitioner to bear the burden of showing some impairment to the presentation of the defense resulting from counsel's e[illegible] A substantial number of state jurisdictions require a defendant to demonstrate prejudice.

2 Two Circuits (the Fourth and Seventh) place a "harmless beyond a reasonable doubt" burden on the State. Wood v. Zahradnick, 678 F. 2d 980, 982 (4th Cir. 1978); Wade v. Franzen, 678 F.2d 58, 59 (7th Cir. 1982). Two Circuits (the Third and Eighth) hold that the accused must first demonstrate that, but for counsel's ineffectiveness, the proceedings before the trier of fact would have been materially different in a way "helpful" or "beneficial" to the accused; once the accused makes this showing, the burden shifts to the State to show that counsel's ineffectiveness was harmless beyond a reasonable doubt. United States v. Baynes, 687 F.2d 659, 673 (3d Cir. 1982), and United States ex. rel. Green v. Rundle, 434 F. 2d 1112, 1115 (3d Cir. 1970); Reynolds v. Mabry, 574 F.2d 978, 980 (8th Cir. 1978) (citing McQueen v. Swenson, 498 F.2d at 220). Three Circuits (the Fifth, Ninth and Eleventh) have adopted a standard that requires the accused to demonstrate that counsel's errors and omissions impaired the defense in some fashion. Washington v. Strickland 693 F.2d 1243 (5th Cir. 1982) United States v. Tucker, 716 F.2d at 588 (9th Cir. 1983); Adams v. Strickland, 709 F.2d 1443, 1446 (11th Cir. 1983). The Sixth Circuit does not require a showing of prejudice, so there has been no need to formulate a standard. The First and Tenth Circuits have not expressed any opinion on the degree of prejudice that must be shown by a petitioner. See, e.g., United States v. Campa, 679 F.2d 1006, 1009 (1st Cir. 1982); United States v. Glick, 710 F.2d 639, 644 n.6 (10th Cir. 1983).

3 In developing its standard, the plurality opinion in U.S. v. Decoster 624 F.2d 196 (D.C. Cir. 1979), relied extensively on a passage from Commonwealth v. Safarien, 366 Mass. 89, 96, 315 N.E. 2d 878, 883 (1974), which requires a showing that counsel's deficiency "has likely deprived the defendant of an otherwise available, substantial ground of defense." (emphasis added). It is evident that this is a process-oriented test. The Supreme Judicial Court of Massachusetts explicitly relied on process-oriented federal cases; it formulated a test of prejudice that required the defendant to demonstrate impairment to the defense; and the court specifically disavowed any inquiry that would exclusively concentrate on whether the trial was fair or guilt was established. Id. at 884. The outcome-oriented test in Decoster therefore bears little relationship to its process-oriented seed. (It should be noted that the South

Carolina Supreme Court cited Decoster in support of its opinion in Petitioner's direct appeal. State v. Hyman, 281 S.E. 2d 209, 213 (S.C. 1981)).

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

William Gibbs Hyman,

Applicant,

vs.

Daniel R. McLeod, South Carolina Attorney General,

Respondent.

ORDER

This is a post-conviction relief proceeding. The Applicant was convicted of murder and armed robbery and was sentenced to death. The South Carolina Supreme Court affirmed both the conviction and the sentence of death. The United States Supreme Court denied a Petition for a Writ of Certiorari, denied a Petition for reconsideration of its denial of the Petition for Writ of Certiorari. Applicant has applied to this Court for post-conviction relief. An evidentiary hearing was held.

On the night of March 24, 1979, the Applicant and four other persons travelled from North Charleston, South Carolina, to the home of two elderly men, Teagus and Collins Griffis, in Ravenel, South Carolina. They intended to rob the two men either through the use of deception or violence. They carried a shotgun and ammunition to accomplish their purpose. Applicant's wife and Susan Alday knocked on the door of the trailer, but were unable to entice the occupants outside. Thereafter, Alday, Robert Hinson and the Applicant went back to the trailer door. It was opened by the occupants, and one of

Griffis brothers shot and seriously wounded Hinson. A general melee ensued. Collins Griffis was struck on the head several times, blood was spattered throughout the trailer, and Teagus Griffis was shot in the chest with a shotgun and died. The Applicant and the other participants were arrested and charged with murder and armed robbery on or about April 1, 1979. The Applicant's family retained Mr. Demetrious J. Stratos to represent the Applicant and his wife. Mrs. Hyman subsequently obtained other counsel. On July 9, 1979, Mr. Stratos informed Judge Clyde Eltzroth that Mr. Hyman wished to have him relieved as counsel. Mr. Hyman stated upon questioning: "I just don't believe that Mr. Stratos is up to date on the law." The Motion was denied and the Clerk of Court was instructed to appoint an additional attorney for the Applicant. Mr. Landon Louthian was the second attorney appointed to represent the Applicant. Prior to trial, the Solicitor offered Applicant a plea bargain whereby the State would abandon its request for the death penalty in exchange for a guilty plea. Mr. Stratos and Mr. Louthian advised the Applicant that it would be in his best interest to accept the plea bargain. The Applicant refused, and the Court was informed of this fact. The case proceeded to trial.

At the conclusion of the post-conviction relief hearing, I dismissed all of the grounds upon which Petitioner bases his allegation that his conviction and sentence are unlawful except those raising the issue of ineffective assistance of counsel. The grounds denied at the conclusion of the hearing were:

1. Jury Improperly Charged as to Responsibility: Petitioner Hyman has been denied due process of law and equal protection of the law, in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, Section 3 of the South Carolina Constitution in that the jury deciding his punishment was not charged as to the fact that they alone had the heavy responsibility of determining whether the Petitioner would live or die.

This issue was resolved adversely to the Applicant in State v. Hyman, 276 S.C. 559, 281 S.E.2d 209 (1981) and State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981). In State v. Linder the Court held:

> Use of the word 'recommend' by the trial judge or Solicitor is not per se suspect. Under the statute 'recommendation' is the term applied to the jury's function at this phase of the trial. To instruct the jury that it will recommend what sentence the convicted murderer will be given is not improper and does not mask the true nature of the jurors' responsibility at this phase of the trial.

2. Denied Due Process-Improperly Drawn Jury: Petitioner Hyman has been denied due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, Section 3 of the South Carolina Constitution and his right to trial by jury in violation of the Sixth Amendment to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution by the refusal of the South Carolina Supreme Court to enforce the clear mandate of the South Carolina legislature that jurors with scruples opposed to capital punishment are not to be disqualified for cause from sitting upon juries in capital cases.

In State v. Hyman, supra, the Court stated:

> [Hyman] further argues that S. C. Code §16-3-20(E) prohibits the exclusion of prospective jurors on the basis of their opposition to capital punishment. We disagree.
>
> This contention was resolved in State v. Goolsby, 275 S.C. 110, 268 SE2d 31 (1980) where [the Court] held when a potential juror was prevented from rendering an impartial decision or vote for the death penalty under any circumstances he could properly be excluded under §16-3-20(E) because of the inability of that juror to faithfully carry out his duty under the law. See State v. Tyner, 273 S.C. 646, 258 SE2d 559 (1979).

3. Denied Due Process-Punishment for Trial by Jury:

That Petitioner has been denied due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, Section 3 of the South Carolina Constitution by the application of the capital murder statute to penalize him for asserting his right to trial by jury.

This ground is without merit.

> While confronting a Defendant in plea bargaining with the risk of more severe punishment clearly may have a discouraging effect on the Defendant's assertion of his trial rights, the imposition of these difficult choices is an inevitable - and permissible - attribute of any legitimate system which tolerates and encourages the negotiation of pleas.

Bordenkircher v. Hayes, 434 U.S. 357, 98 S. Ct. 663, 54 L. Ed 2d 604 (1978). The State has a legitimate interest in encouraging the entry of guilty pleas and in facilitating plea bargaining, a process mutually beneficial to both the Defendant and the State. Corbitt v. New Jersey, 439 U.S. 212, 98 S. Ct. 492, 58 L. Ed. 2d 466 (1978). The simple reality that the prosecutor's interest at the bargaining

table is to persuade the Defendant to forego his right to plead not guilty is constitutionally legitimate. Bordenkircher v. Hayes, supra.

4. Death Penalty Applied in Arbitrary and Freakish Manner: Petitioner has been denied due process of law and equal protection of the laws in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, Section 3 of the South Carolina Constitution and the guarantees against Cruel and Unusual Punishment in violation of the Eighth Amendment of the United States Constitution and Article 1, Section 15 of the South Carolina Constitution by the imposition of the death penalty in a freakish and arbitrary manner.

When the death penalty has been imposed it is mandatorily reviewed by the South Carolina Supreme Court to determine (1) whether the sentences of death were imposed under the influence of passion, prejudice, or any other arbitrary factor; (2) whether the evidence supports the sentencing authority's findings of statutory aggravating circumstances; and (3) whether the sentence of death is excessive or disproportionate to the penalty imposed on similar cases, considering both the crime and the Defendant. S. C. Code Ann. §16-3-25 (Cum. Supp. 1978). This ground was resolved in State v. Hyman, supra.

5. Inadequately Guided Discretion of Sentencing Authority: Petitioner has been deprived of his right to a capital sentencing procedure in which the discretion of the sentencing authority is

adequately guided, in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article 1, Section 3 and Section 15 of the South Carolina Constitution. In particular, the South Carolina Death Penalty Statute provides no guidance for the sentencing authority as to how to consider aggravating circumstances in relation to mitigating circumstances in determining whether a capital defendant should be sentenced to death or to life imprisonment.

This issue was resolved adversely to the Applicant in Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976) and State v. Shaw, 273 S.C. 194, 255 S.E.2d 799 (1979). The Court in State v. Shaw stated:

> The statutory death penalty complex adopted by the General Assembly in 1977 is constitutionally indistinguishable from the statutory complex approved by the United States Supreme Court in Gregg. The new death penalty procedures focus the sentencing authorities' attention on the particularized nature of the crime and the particularized characteristics of the individual defendant. The guidance provided by the sentencing procedures reduces the likelihood that the sentencing authority will impose a sentence of death capriciously.

6. Disproportionate Sentence-Lack of Triggerman Evidence: Petitioner was denied his right not to be sentenced to death in the absence of a showing that he intended to kill the victim of the homicide with which he was charged, in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article 1, Section 3 and Section 15 of the South Carolina Constitution.

I find imposition of the death penalty in this case does not offend the standards set out in Enmunds v. Florida, 50 U. S. L. W. 5087 (1982). The evidence shows that the

Applicant did intend the death of the victim. The record clearly reflects that Applicant planned, prepared for and committed a brutal crime for the purpose of obtaining money. State v. Hyman, supra. A shotgun and ammunition were taken to the scene by Applicant and his accomplices. Additionally, there was testimony at trial that Applicant was, in fact, the triggerman. Under the facts and circumstances of this case, Applicant cannot seriously contend that he did not intend or contemplate that life would be taken. See State v. Copeland, Op. No. 21808 (Filed November 10, 1982).

7. Disproportionate Sentence-Equal Protection: Petitioner was denied Equal Protection of the laws in violation of the Fourteenth Amendment to the United States Constitution and Article 1, Section 3 of the South Carolina Constitution in that he alone of all his co-defendants was sentence to death where there is an absence of a finding that he was the "triggerman."

IM

While all of the conspirators are equally guilty of the crime of murder as defined by the laws of this State, they are not ipso facto deserving of the same punishment. See Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978). There is evidence in the record to support a finding that the Applicant was the triggerman. See State v. Shaw, supra.

8. Felony Murder, Coupled with Felony Murder-Aggravating Circumstances: Petitioner Hyman has been deprived of his right to the guided exercise of sentencing discretion, and of his right to be protected against double jeopardy, in violation of

the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Article 1, Section 3, Section 12, and Section 15 of the South Carolina Constitution.

This issue was resolved adversely to the Applicant in Hyman v. State, Op. No. 21841 (Filed January 4, 1983) and Cummings v. State. No objection was made on this point at trial or direct appeal, and the Applicant may only present it now to support a claim of ineffective representation, not as a separate ground for relief. As to the allegation that the jury, having found Applicant guilty of armed robbery, was left totally unguided as to the ultimate decision of life imprisonment or death, the trial judge charged the jury:

> If you conclude that the recommendation should be life imprisonment, you may return that without finding any mitigating circumstances and even if an aggravating circumstance is present. (Emphasis added)

Our Supreme Court upheld that charge in State v. Hyman, supra.

9. The Arbitrary and Capricious Imposition of the Death Penalty: The Petitioner has been deprived of his right not to be sentenced to death pursuant to procedures which impose the death penalty in an arbitrary and capricious manner in that the death penalty is disproportionately applied when the victims are white in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article 1, Section 3 and Section 15 of the South Carolina Constitution.

This issue has been addressed on numerous occasions and resolved adversely to the Applicant. State v. Hyman, supra; State v. Shaw, supra; State v. Linder, supra; State v. Goolsby, supra; State v. Copeland, supra. It warrants no

further discussion here.

10. Denial of Right to Trial by Representative Jury: The Peitioner was denied his right to trial by a jury fairly selected from a representative cross-section of the community in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 3 and Section 14 of the South Carolina Constitution by the systematic exclusion of women and young persons from his jury.

In State v. Hyman, supra, the Court took note that voter registration lists are the most representative source of a community. See 80 A.L.R. 3d 869; Moorer v. State, 244 S.C. 102, 135 S.E.2d 713 (1964); Swain v. Alabama, 380 U.S. 202, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965). Women with a child under the age of seven may be excused from jury duty pursuant to S. C. Code Ann §14-7-890 (1976). There has been no showing the trial judge abused his discretion in excusing jurors under this section. State v. Hyman, supra. The Solicitor may use his peremptory challenges for any reason or no reason at all. State v. Plath, 277 S.C. 126, 284 S.E.2d 221 (1981); State v. Truesdale, ___S.C.___, 296 S.E.2d 528 (1982). This contention has no merit.

11. Denial of Right to Neutral and Representative Jury: The exclusion from the jury at Petitioner's trial of persons generally opposed to the death penalty violated his rights under the Sixth and Fourteenth Amendments of the United States Constitution and Article 1, Section 14 of the South Carolina Constitution to a neutral and representative jury on the question of guilt and of punishment.

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This issue has been decided adversely to the Applicant. State v. Hyman, supra; State v. Goolsby, supra; State v. Tyner, supra; State v. Linder, supra; State v. Copeland, supra; State v. Butler, ___S. C.___, 290 S.E.2d 420 (1982). Further discussion here would be of no benefit.

12. Disproportionality of Death Penalty Based on Aggravating Circumstances: Petitioner has been denied due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, Section 15 of the South Carolina Constitution in that the death penalty is disproportionate where the only aggravating circumstances is robbery or larceny.

This was resolved against the Applicant in State v. Hyman, supra. The Court stated:

> We are required under §16-3-25 to determine 'whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases [footnote omitted] considering both the crime and the defendant.' The record clearly reflects [Applicant] planned, prepared and committed a brutal crime for the purpose of obtaining money. The death penalty is proportionate to a crime of this nature and to the crime and the defendant in this case.

13. Due Process-Unbridled Discretion of Solicitor: Petitioner has been deprived of due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, Section 3 of the South Carolina Constitution and has been subjected to cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution and Article 1, Section 15 of the South Carolina Constitution in that the decision as to which person or persons shall even be subjected to a possible sentence of death is subject to the unfettered and unbridled discretion of

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the Circuit Solicitor.

This issue was decided adversely to the Applicant in State v. Shaw, supra. and Gregg v. Georgia, supra. and does not merit further consideration by this Court.

14. Inadequacy of Counsel-Burden of Prejudice on Defendant: Petitioner has been deprived of his right to due process in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, Section 3 of the South Carolina Constitution and of his right to counsel in violation of the Sixth Amendment to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution in that the burden of showing prejudice from the inadequacy of counsel has been solely placed upon him.

The South Carolina Supreme Court held in Beckett v. State, ___S.C.___, 294 S.E.2d 46 (1982) the Petitioner has the burden of showing that counsel's actions or omissions were prejudicial to him. In addition, the South Carolina Supreme Court upheld this standard in Applicant's direct appeal. This ground for relief has no merit.

15. Failure to Comply with Statute: Petitioner was denied due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, Section 3 of the South Carolina Constitution and was subjected to cruel and unusual punishment in violation of the Eighth Amendment of the Constitution and Article 1, Section 15 of the South Carolina Constitution in that the South Carolina Supreme Court has not complied with the clear and unambiguous intent of the South Carolina legislature [illegible] the

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requirement in the death penalty statute that each capital case be compared with "similar" cases.

The task of defining "similar cases" and the scope of any comparative analysis was discussed in great detail in State v. Copeland, supra. The Court held that "the search for 'similar cases' can only begin with an actual conviction and sentence of death rendered by a trier of fact in accordance with §16-3-20 of the Code. We consider such findings by the trial court to be a threshold requirement for comparative study and indeed the only foundation of 'similarity' consonant with our role as an appellate court." The Court went further to hold that it is of no consequence that the South Carolina "universe" has consisted of only five cases as of November 10, 1982. Regarding State v. Hyman, the Court said: "The jury recommended a sentence of death and we affirmed, considering the penalty neither excessive nor disproportionate with respect to the crime and the defendant and not withstanding the lack of any truly 'similar' case to that point in time." Given the definition of "similar cases" and the scope of comparative analysis as set out above, I find this issue to be without merit.

16. Improper Reasonable Doubt Charge: Petitioner has been denied due process as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, Section 3 of the South Carolina Constitution in that the charge given to the jury on reasonable doubt in his trial substantially lessened the burden of proof on the State.

I find the trial judge's charge on reasonable doubt is well within the guidelines set by the South Carolina Supreme

Court. State v. Copeland, supra; State v. Butler, ___ S.C. ___, 290 S.E.2d 1 (1982); State v. Griffin, 277 S.C. 193, 285 S.E.2d 631 (1981).

17. Denial of Right of Presence at Trial: Petitioner was denied his right to be present at each and every crucial stage of the proceedings against him in violation of the Sixth Amendment to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and in violation of the due process guaranteed to him by the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, Section 3 of the South Carolina Constitution in that crucial hearings and matters were gone into on the record in open court at a time when Petitioner was not present nor informed of his right to be present.

The record reflects the Applicant was not present when Roy McClain, the first attorney appointed to work with Mr. Stratos, was relieved. "There is no right of defendant to be present when purely ministerial acts are performed." There is no presumption of prejudice from the absence of the accused. State v. Smart, Op. No. 21812 (Filed November 23, 1982). Applicant has shown no prejudice.

18. Denial of Right to Trial by Jury-Discriminately Chosen Jury: Petitioner was deprived of his right to a trial by an impartial jury pursuant to the Sixth Amendment to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and to due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, Section 3 of the South Carolina

Carolina Constitution in that excusing jurors from his trial who expressed scruples against capital punishment resulted in a disproportionately racially imbalanced jury.

This is factually incorrect. Mr. Louthian testified according to his trial notes, Applicant's jury was approximately one-half black, one-half white and one-half male, one-half female. Even if all four of the jurors excused for scruples against capital punishment were black, Applicant's jury was not racially imbalanced.

19. Due Process-Pro-Death Jury: The Petitioner was denied due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, Section 3 of the South Carolina Constitution and was denied an impartial jury in violation of the Sixth Amendment to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution in that the trial judge failed to excuse jurors from the venire who expressed sentiment to automatically vote for the death penalty in each and every case of murder.

This issue was resolved adversely to the Applicant in State v. Copeland, supra and State v. Hyman, supra:

> A review of the voir dire examination in this case reveals that the prospective jurors were asked if they could give both the State and the [Applicant] a fair and impartial trial. The voir dire conducted ensured the [Applicant] was so tried. See Adams v. Texas, 448 U.S. 38, 100 S. Ct. 2521, 65 L. Ed. 2d 581 (1980).

All of the grounds listed above are denied.

The ineffective assistance of counsel issue was raised on direct appeal to the South Carolina Supreme Court

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and the Court stated:

> Appellant argues he was denied the effective assistance of counsel. It is unusual to address this issue on direct appeal. However, Appellant contends his Motions to have counsel relieved, for a mistrial and for a new trial were all based upon the incompetency of counsel, therefore, it is properly before us for review.
>
> Moreover, as this is a capital case, we apply the Rule, in favorem vitae, and examine the record for error.
>
> Appellant's claims are insufficient to show that justice was not done. He has not shown how counsel's alleged deficiencies affected the outcome of the trial. In United States v. DeCoster, 624 F. 2d 196, 214 (D.C. Cir. 1976), the Court held, '[i]n the absence of a governmental impediment to effective assistance of counsel, the Court cannot lightly vacate a conviction on the basis of its own appraisal of the performance of defense counsel.' We conclude there is no evidence of probative value supporting Appellant's contention that he was denied the effective assistance of counsel. Green v. State, 276 S.C. 213, 277 S.E.2d 481 (1981).

JMM

The State takes the position that this issue is not properly before this Court, it having been raised on direct appeal. I disagree. The Court noted in State v. Hyman, supra that it was unusual to address the issue of ineffective assistance of counsel on direct appeal. Additionally, prior to its decision in State v. Hyman the Court entered an Order in this case which stated:

> This matter comes before the Court by way of a Motion to remand for an evidentiary hearing in which a previous Motion for a new trial filed by Applicant, pro se, is renewed. Both Motions raise the issue of trial counsel's effectiveness. It appears that an appeal from Appellant's conviction and sentence is currently pending before this Court. It further

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> appears that a full record on this issue may be developed in a proceeding for collateral relief, should that be necessary. Therefore,
>
> IT IS SO ORDERED that the Motion for a new trial and the Motion to remand are denied without prejudice and with leave to raise the issue of trial counsel's effectiveness in collateral proceedings. Supreme Court's Order, June 18, 1980. [Emphasis added.]

Accordingly, both in its published decision in State v. Hyman, supra and its Order of June 18, 1980, the Supreme Court recognized that the Applicant has a right to seek an evidentiary hearing on the issue of effectiveness of counsel.

It is clear that a defendant is entitled to effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970). A Court should not measure the competency of counsel's advice by retrospectively considering whether it was right or wrong. The proper test is whether counsel "was within the range of competence demanded of attorneys in criminal cases." McMann v. Richardson, supra, at 770-71. In Marzullo v. Maryland, 561 F. 2d 540 (4th Cir. 1977), the Court said even under this "standard representation need not be errorless in order to be effective. A convict generally must establish that his counsel's error was so flagrant that a Court can conclude that it resulted from neglect or ignorance rather than from informed professional deliberation." The Court in Marzullo also noted that, in determining whether counsel was effective, they adhered to the statement made in Coles v. Peyton, 389 F. 2d 224 (4th Cir. 1968):

> Counsel for an indigent defendant should be appointed promptly. Counsel should be afforded a reasonable opportunity to prepare to defend an accused. Counsel must confer with his client without undue delay and as often as necessary, to advise him of his rights and to elicit matters of defense or to ascertain that potential defenses are unavailable. Counsel must conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial.

The Court further noted, in Marzullo, that the normal competency standard is necessarily broad and flexible because it is designed to encompass many different factual situations and circumstances. In Moore v. United States, 432 F. 2d 730 (1970) the Court attempted to define the art of the advocate:

> A retrospective examination of a lawyer's representation to determine whether it was free from any error would exact a higher measure of competency than the prevailing standard. [Footnote omitted] Perfection is hardly attainable and certainty is not the general rule, especially in professional work where intuitive judgments and spontaneous decisions are often required in varying circumstances. The artistry of the advocate is difficult to judge retrospectively because the elements influencing judgment usually cannot be captured on the record. The kaleidoscopic range of possibilities often seems limitless, and it is proverbial that the finest ideas emerge on the way back from the Courthouse. The advocate's work, therefore, is not readily capable of audit like a bookkeeper's... But since what is required is normal and not exceptional representation, there is room for the realization that it would be difficult to find a case where even the ablest and most experienced trial lawyer would be completely satisfied after a searching reexamination of his conduct of a case.

In addition to demonstrating that trial counsel committed errors of either omission or commission on behalf of the Applicant, Applicant must demonstrate, other than through [redacted] speculation and unsupported [redacted] that [redacted]

prejudiced by the errors complained of. Kibler v. State, 267 S.C. 250, 227 S.E.2d 199 (1976); Beckett v. State, ___S.C.___, 294 S.E.2d 46 (1982). An error without a showing of prejudice does not render counsel's representation ineffective.

With regard to the issue of ineffective assistance of counsel, the presentation by the Applicant's counsel was exhaustive and left no stone unturned. I have reviewed the entire record and have thoroughly and meticulously considered all of the testimony presented and the arguments of counsel. The actions and decisions of trial counsel are not to be measured in terms of results, but rather in terms of the previously discussed level of competency, and the burden is upon the Applicant to show prejudice. I find that the Applicant has not shown how he was prejudiced by trial counsel's acts or omissions. I find that trial counsel met the level of competence as enunciated in Marzullo v. Maryland, supra and that the Applicant was adequately and effectively represented by his attorneys at all stages of the proceedings. I specifically find that Applicant's attorneys met each requirement imposed under the Coles v. Peyton test.

Of course, it is the total representation of the Applicant, and not the particular representation of one of his attorneys or the other, which must be analyzed in determining whether or not Applicant received effective assistance of counsel. I find that a review of the testimony of Mr. Stratos and Mr. Louthian concerning their representation of Applicant is unwarranted.

Mr. Stratos testified he was retained by the Applicant's brother, Phillip Hyson, shortly after the Applicant was arrested in April of 1979. Although Mr. Stratos did not own current volumes of the South Carolina Reports, South Carolina Digest, or South Eastern Reporter, etc., he had access to these books prior to the trial of this case. Counsel testified that he did not now have a file on the Applicant. However, prior to trial, he obtained and reviewed various documents, statements, indictments, arrest warrants, etc., and turned them over to co-counsel who maintained Applicant's file. Mr. Stratos testified he met with Applicant at the county jail on numerous occasions and spent considerable time discussing with Applicant the facts and circumstances surrounding his case. Mr. Stratos testified that he did not visit Applicant in jail from July 24, 1979 until October 1, 1979, but that he was well aware of the facts and circumstances of the case and did not obtain any new information when he visited Applicant on numerous occasions between October 1, 1979 to October 9, 1979.

Mr. Stratos testified that based on the facts as related to him by Applicant and as discovered through his investigation, he advised Applicant to plead guilty to the crime of murder in exchange for a life sentence. To this Applicant responded he would not plead guilty because he did not kill Teague Griffis. Mr. Stratos testified he explained the theory "the hand of one is the hand of all" to Applicant on numerous occasions. Counsel spoke with and obtained statements from the State's primary witnesses, and he was present at Applicant's preliminary hearing

He testified that the Solicitor's file was available to him and that he reviewed it. Mr. Stratos testified he knew of the existence of Red Coulston, but based on information given him by Applicant concerning criminal involvement between the two, did not feel Coulston would testify for the State. Mr. Stratos reviewed the statements of the State's primary witnesses with Applicant to help prepare him to testify as well as to convince him to plead guilty. Counsel forwarded the statements to Applicant's family in the hope they would persuade Applicant to change his plea. Mr. Stratos testified he spent a considerable amount of time prior to trial locating and attempting to locate defense witnesses to substantiate certain aspects of Applicant's story.

Mr. Stratos testified that in preparation for trial he went over the facts three to four hundred times and rehearsed his jury argument for many hours. He obtained and reviewed the jury list prior to trial. His theory of jury selection was to select jurors who were, in his opinion, "invidious". Counsel testified his theory of the case was basically Applicant and his wife's word against that of the other three accomplices on the issue of who the triggerman was. In furtherance of this, Mr. Stratos prepared Applicant to testify on his own behalf. Counsel acknowledged that this theory was geared more for the sentencing phase of the trial than the guilt phase. As Applicant had no defense as to guilt.

Applicant presented numerous expert witnesses, skilled in the trial of criminal cases, at the evidentiary hearing. All

of these witnesses, without exception, testified that there was no issue of substance concerning guilt or innocence, and that the only issue present was the issue of punishment. Mr. Stratos testified that Mr. Louthian did most of the work on the mitigation phase of the trial.

Co-counsel Landon Louthian received notice of his appointment on July 24, 1979. He telephoned Mr. Stratos and discussed Applicant's background and the facts and circumstances surrounding this case. Within a few days Mr. Louthian visited Applicant in jail and discussed the case with him. Mr. Louthian testified that although he explained the "hand of one is the hand of all" theory to Applicant at least twice, Applicant still refused to plead guilty.

Mr. Louthian met with a number of Applicant's family members. Included among them were Becky Fain and Gracie Smith, two of Applicant's sisters. He attempted to obtain support and assistance from them to mobilize the family in preparation for trial. Counsel questioned various family members, as well as the Applicant, concerning any prior emotional, drug or alcohol problems the Applicant may have had, and it was at his suggestion that Applicant was sent to the South Carolina State Hospital for evaluation.

Mr. Louthian talked with most, if not all, of the witnesses presented in mitigation prior to their testifying. He reviewed with them basically the areas he wished them to cover. Counsel testified [redacted] prepared for and expected additional family members [redacted] during the sentencing phase. Mr. Louthian [redacted] various members of the [redacted]

[redacted] additional witnesses such as neighbors [redacted] Applicant's employer, etc., as they had informed him they "would see to it" these people were brought to Court. When these family members, as well as the additional witnesses, did not voluntarily appear in Court, Mr. Louthian testified he did not feel it would be in Applicant's best interest to force these individuals to testify.

Mr. Louthian testified that he reviewed Applicant's testimony and went over potential cross-examination with him. He felt Applicant's only chance at both the guilt and sentencing phase of trial was for Applicant to take the stand.

In addition, counsel testified he discussed the case with various police officers and was aware of Collins Griffis' background and history. He read the South Carolina Death Penalty Statute and did research prior to trial.

Mr. Louthian testified that Applicant's jury was approximately one-half white and one-half black, one-half male and one-half female. He felt this was a good mixture [redacted] of the community and they would not be death prone.

Applicant raises numerous specific allegations of ineffective assistance of counsel. They are:

1. (a.) Defense counsel failed to make an informed evaluation of defenses available to Petitioner and failed to conduct meaningful discussions with Petitioner of such defenses. In particular,

(i.) Defense counsel misunderstood and/or failed to appreciate the law applicable to capital cases and the Constitutional defects in the South Carolina Death Penalty Statute and Procedures;

(ii.) Defense counsel misunderstood and made no effort to discover how to prepare or try a Death Penalty case or even a Criminal case;

(iii.) Defense counsel failed to instruct the Petitioner as to his right to testify in his own defense in his trial.

(b.) Defense counsel failed to help insure the Petitioner that he had an impartial jury. In particular,

(i.) Defense counsel failed to investigate the backgrounds of those persons who were presented for jury duty on [redacted]

(ii.) Defense counsel utterly failed to understand or take advantage of the voir dire provisions as provided in the South Carolina Code;

(iii.) Defense counsel failed to exercise peremptory challenges in an appropriate manner;

(iv.) Defense counsel not only participated in, but suggested the removal of jurors from the venire who were scrupled as to the death penalty and made no efforts to rehabilitate them;

(c.) Defense counsel failed to investigate, develop, and present effectively the psychiatric condition of the Petitioner at the time of the offenses with which he was charged. Facts concerning Petitioner's psychiatric condition could have been developed as a mitigation of punishment or lessening of culpability. In particular,

(i.) Defense counsel failed to investigate the state of mind of the Petitioner on the day of the killings, and particularly that the Petitioner was under the influence of alcohol, drugs, and emotional distress;

(ii.) Defense counsel failed to obtain any psychiatric history whatsoever upon the Petitioner;

(iii.) Defense counsel failed to [illegible] psychiatric testimony on behalf of the Petitioner based upon such a history of his psychiatric condition;

(iv.) Defense counsel failed even to make an effort to obtain independent psychiatric evaluation of Petitioner's competency and sanity, instead relying on the State's findings;

(v.) Defense counsel failed to investigate the psychiatric issues in order to exercise independent judgment on the possibility of offering psychiatric testimony;

(vi.) Defense counsel failed to undertake an independent factual investigation of their client's psychiatric condition;

(vii.) Defense counsel failed to have Petitioner fully examined by psychiatric or neurological investigators and did not even ask the court for permission to have such appointed.

(d.) Defense counsel utterly failed to conduct any investigation into the facts relied on by the State as proof for the substantive offenses, in particular,

(i.) Defense counsel failed to review the evidentuary exhibits for trial or any other physical evidence presented at trial;

(ii.) Defense counsel failed to interview witnesses for the State, or to find, interview, or prepare prospective witnesses for the defense;

(iii.) Defense counsel failed to request funds for or to conduct any ballistics testing which might have shed light on the way the killing occurred and who was the triggerman;

(iv.) Defense counsel failed to investigate the criminal records or psychiatric histories of any of the State's witnesses;

(v.) Defense counsel failed to get or even try to obtain a listing of potential State witnesses or know or understand who

would be presented as evidence against the Petitioner.

(e.) Defense counsel made rambling, incoherent, and self-deprecating opening and closing statements, and not only failed to argue any facts or theories potentially helpful to the Petitioner, but in addition reinforced and re-argued the theories and facts actually helpful to the Prosecution.

(f.) Defense counsel failed to present for the defense and to cross-examine for the State witnesses during the trial of the case in a manner consistent with lawyers competent to practice criminal law.

(g.) Defense counsel failed to research the law of the State of South Carolina, the Fourth Circuit Court of Appeals, or the United States of America which was applicable to criminal trials in general and capital cases in particular, so that defense counsel was essentially ignorant of the law as it pertained to Petitioner's case throughout his entire guilt and mitigation trials.

(h.) Defense counsel failed to take advantage of and utilize strategies which might be helpful to the Petitioner, and in particular failed to support the Petitioner's motion to relieve counsel, and have a mis-trial granted, and in addition, defense counsel undermined the Petitioner's position with the Court and jury by disassociating themselves from the Petitioner at every opportunity.

(i.) Defense counsel failed to discuss the case with Petitioner prior to or during trial in an effort to be able to provide adequate assistance.

(j.) Defense counsel failed to request any pre-trial motions of the Court. In particular, defense counsel failed to file the necessary motions to challenge legitimate constitutional defects in the South Carolina Death Penalty

Statute and Capital Sentencing Procedures. Defense counsel failed to request any procedures on behalf of Petitioner or to file any other motions whatsoever.

(k.) Defense counsel failed to request any charges to the jury concerning aggravating and mitigating circumstances.

(l.) Defense counsel failed to prepare Defendant for his testimony in the Penalty Phase of his trial.

(m.) Defense counsel failed to investigate, develop, and present all available facts for mitigation of the punishment of the Petitioner and defense counsel failed to contact appropriate character witnesses on behalf of the Petitioner in order to better explain the Petitioner to the jury at the sentencing trial.

(n.) Defense counsel failed to represent Petitioner's interest as the "zealous advocates" required by law and in particular treated this case as they might an extremely minor criminal matter rather than the serious trial that it actually was. Defense counsel failed to recognize their own disdain for the Petitioner which was necessarily communicated to the jury and which was such that, at the very least, defense counsel should have withdrawn as counsel for the Petitioner.

(o.) Defense counsel failed to recognize the unique demands of defense counsel in capital cases and thereby failed to request and obtain the necessary assistance in order to try a case competently before a jury and in order to present the defendant's humanity to the jury and simply to be able to try the case properly.

(p) Defense counsel failed to recognize the unique seriousness of the Petitioner's case and thereafter failed to approach its demands with conscientious and serious resolve.

The Applicant urges the Court to apply a standard of "representation within the range of competence demanded of criminal defense attorneys in capital cases. The Georgia Supreme Court has in a series of cases dealing with the issue of effective assistance of counsel in death penalty cases followed the precise standard for "determining counsel's effectiveness as is followed in the ordinary case. Georgia has rejected the application of a special standard in capital cases and I, also, reject it. Berryhill v. Ricketts, 242 Ga. 447, 249 S.E.2d 197 (1978); Young v. Ricketts, 242 Ga. 559, 250 S.E.2d 404 (1978); Goodwin v. Hopper, 243 Ga. 193, 353 S.E. 2d 156 (1979); Bowden v. Zant, 244 Ga. 260, 260 S.E.2d 465 (1979).

2. Ineffective Assistance of Counsel - See facts already alleged in 1 (a), supra.

(a) Defense counsel failed to make an informed evaluation of defenses available to Petitioner and failed to conduct meaningful discussions with Petitioner of such defenses. In particular,

(i) Defense counsel misunderstood and/or failed to appreciate the law applicable to capital cases and the Constitutional defects in the South Carolina Death Penalty Statute and Procedures;

No constitutional defects are known to exist in the South Carolina Death Penalty Statute and Procedure. Applicant fails to set forth any specific act or omission by trial counsel which was prejudicial to him and was a result of this asserted lack of familiarity. The Georgia Supreme Court rejected this vague type of attack on counsel's knowledge of the death penalty statute in Bowden v. Zant, supra.

(ii) Defense counsel misunderstood and made no effort to discover how to prepare or try a Death Penalty case or even a Criminal case;

This contention is contrary to the testimony presented. A substantial portion of both D. J. Strato· and Landon Louthian's practice is devoted to the practice of criminal law. Both attorneys were involved in death penalty cases and/or potential death penalty cases prior to the enactment of the 1977 Act.

(iii) Defense counsel failed to instruct the Petitioner as to his right to testify in his own defense in his trial.

This assertion is factually incorrect as reflected by the record in this case and based on the testimony of Mr. Stratos and Mr. Louthian.

(b) Defense counsel failed to help insure the Petitioner that he had an impartial jury. In particular,

(i) Defense counsel failed to investigate the backgrounds of those persons who were presented for jury duty on Petitioner's panel;

This assertion is also factually incorrect. The testimony showed Applicant's attorneys had and utilized the computer printout listing the names, ages, sex, address, occupation, etc., of the jury panel from which Applicant's jury was selected. Additional information on the persons presented for jury duty was obtained from the trial court's voir dire of the panel. While additional investigation into a juror's background can be conducted and while it may be the better practice to conduct further investigation, Applicant has failed to show any specific prejudice resulting from counsels' election not to conduct a more extensive investigation.

(ii) Defense counsel utterly failed to understand or take advantage of the voir dire provisions as provided in the South Carolina Code;

While counsels' voir dire of perspective jurors was limited, no prejudice has been shown. Applicant appears to assert that defense attorneys must conduct extensive or unlimited individual voir dire. The scope of voir dire is largely a tactical decision, and it is reasonable that a lawyer may believe that intensive questioning may alienate jurors and choose a more limited approach. The Court recently stated in State v. Smart, supra:

> "The function of voir dire examination, however, is to determine specific and real bias or interest in jurors and not to develop personality profiles."

The Court went on to state:

> We suggest to trial judges that an examination of jurors by the Court as directed by Code Section 14-7-1020, prior to their examination by counsel,

could afford the basis for proper limitation of the questioning by counsel to relevant matters, if not the elimination of the necessity for further examination in certain areas.

The unbridled examination of jurors by counsel serves to not only unnecessarily add to the length and expense of the trial, but also serves to antagonize jurors and lessen public respect for jury duty. The extent to which voir dire examination is being permitted by trial judges causes this Court concern, and therefore, this admonition.

(iii) Defense counsel failed to exercise peremptory challenges in an appropriate manner;

Peremptory challenges can be made for any reason or no reason at all. State v. Truesdale, supra; State v. Plath, supra. The assertion that there is an appropriate manner in which to exercise peremptory challenges and that trial counsel acted inappropriately is without merit. This was previously presented to our Supreme Court on direct appeal. The Court found no evidence that counsel was ineffective in this regard.

(iv) Defense counsel not only participated in, but suggested the removal of jurors from the venire who were scrupled as to the death penalty and made no efforts to rehabilitate them;

This is not supported by the record. Counsel may have erroneously "participated in" the removal of one juror; however, the trial court's subsequent questioning of this juror assured that the juror was properly excused. The Applicant has not

demonstrated prejudice in this regard.

Furthermore, since the voir dire was part of the Record before our Supreme Court, I conclude that it is not properly before me now. In view of that, I cannot find that counsel did an inadequate job on voir dire.

(c) Defense counsel failed to investigate, develop, and present effectively the psychiatric condition of the Petitioner at the time of the offenses with which he was charged. Facts concerning Petitioner's psychiatric condition could have been developed as a mitigation of punishment or lessening of culpability. In particular,

(i) Defense counsel failed to investigate the state of mind of the Petitioner on the killings, and particularly that the Petitioner was under the influence of alcohol, drugs, and emotional distress;

This is factually incorrect as the record reflects that at the request of counsel, Applicant was admitted to and evaluated by the South Carolina State Hospital. Although counsel did not obtain the Applicant's complete record from South Carolina State Hospital, I have reviewed this record and find it contained little, if any, favorable information. Applicant has shown no prejudice from counsel's failure to review these records. Further, it is mere speculation that further evaluation would have provided evidence to support the mitigating circumstance that the Applicant was under the influence of an emotional or mental disturbance at the time of the crime. I find that the records and recommendations from the South Carolina State Hospital reveal

that an investigation into the Applicant's "state of mind" was conducted. Additionally, there was ample testimony at the trial that all of the participants in this crime were under the influence of alcohol and/or drugs. This allegation is without merit.

> (ii) Defense counsel failed to obtain any psychiatric history whatsoever upon the Petitioner;

The Applicant testified at the post-conviction relief hearing that he had seen a psychoanalyst approximately a month prior to this incident. He also testified that he never went back to see what the results of his tests were. Applicant could not recall the name of this psychoanalyst and could not remember the location of his office. His present attorneys have not been able to identify or locate this person. It is mere speculation to assume trial counsel could have produced him. Additionally, family members testified at trial that the Applicant had never been seen or evaluated by a psychiatrist and that to their knowledge, he had no emotional problems.

> (iii) Defense counsel failed to obtain adequate psychiatric testimony on behalf of the Petitioner based upon such a history of his psychiatric condition;

Applicant failed to show, prior to this hearing, that he had any history of a psychiatric condition. Dr. Ada Kirkman testified at the hearing as an expert for the Applicant. She stated the Applicant suffered from the mental illness of

alcoholism at the time he committed these crimes. The trial court specifically charged the jury as a statutory mitigating circumstance, if they found support for the circumstance in the record, that the Applicant's capacity to appreciate the criminality of his conduct and/or to conform his conduct to the requirements of the law were substantially impaired. I find the Applicant has shown no prejudice and this ground is without merit.

(iv) Defense counsel failed even to make an effort to obtain independent psychiatric evaluation of Petitioner's competency and sanity, instead relying on the State's findings;

The record shows that counsel made no additional efforts to obtain independent psychiatric evaluation of Petitioner's competency and sanity. Although in hindsight, perhaps such an evaluation would have been useful to counsel, nothing in Dr. Kirkman's testimony at the hearing convinced me that an evaluation of Applicant would have been important for the judge or jury to know at either the guilt or sentencing stage. As previously noted, Dr. Kirkman's testimony contained nothing that was not already testified to at trial. Also, there was nothing to indicate to counsel that an evaluation was necessary. The failure to obtain independent psychiatric evaluation of Applicant was not ineffective assistance of counsel.

(v) Defense counsel failed to investigate the psychiatric issues in order to exercise independent judgment on the possibility of offering psychiatric testimony;

This allegation has been addressed by me in previous discussions, and Applicant has failed to demonstrate any specific prejudice in this regard. This does not constitute ineffective assistance of counsel.

(vi) Defense counsel failed to undertake an independent factual investigation of their client's psychiatric condition;

Mr. Louthian testified he was informed by various members of the Applicant's family that the Applicant had no history of psychiatric or emotional problems. Both Mr. Louthian and Mr. Stratos testified Applicant never informed them that he had seen, visited or been evaluated by a psychoanalyst. Applicant has shown no prejudice by counsel's failure to make further factual investigation, and it is hard to imagine, given the information counsel had, what form further investigation would take. This allegation is without merit.

(vii) Defense counsel failed to have Petitioner fully examined by psychiatric or neurological investigators and did not even ask the court for permission to have such appointed.

Again, Applicant has shown no prejudice. Based on prior discussion of this issue, I find that this allegation does not constitute ineffective assistance of counsel.

(d) Defense counsel utterly failed to conduct any investigation into the facts relied on by the State as proof for the substantive offenses, in particular,

(i) Defense counsel failed to review the evidentuary exhibits for trial or any other physical evidence presented at trial;

This is again factually incorrect. Counsel testified he had either seen some of the physical evidence presented by the State prior to trial or knew of its existence. As to the physical evidence counsel had not seen or did not know to exist, I find Applicant has failed to show in what way he was prejudiced by not having this information available prior to trial.

(ii) Defense counsel failed to interview witnesses for the State, or to find, interview, or prepare prospective witnesses for the defense;

mm

In reviewing the record, I find counsel did locate and interview prospective witnesses for the defense. In addition, counsel interviewed three of the State's primary witnesses (Alday, Midgett, and Hinson) and obtained copies of their statements from the Solicitor. Counsel knew of the existence of the witness Red Coulston well before trial. Based upon information given counsel by the Applicant concerning Coulston's testimony, counsel shoud have known the substance of his testimony.

(iii) Defense counsel failed to request funds for or to conduct any ballistics testing which might have shed light on the way the killing occurred and who was the triggerman;

The key word in this allegation is might. The Court will not speculate concerning what might have occurred if counsel had conducted further investigation. Kibler v. State, 267 S.C. 250, 227 S.E.2d 199 (1976). This is insufficient to support a claim of ineffective assistance of counsel.

(iv) Defense counsel failed to investigate the criminal records or psychiatric histories of any of the State's witnesses;

I have reviewed the criminal records and psychiatric histories, if any exist, of most of the State's witnesses. I find no evidence, other than testimony presented at trial, that any of the State's three primary witnesses (Alday, Midgett, and Hinson), could have been additionally impeached based on these records. This ground is without merit.

mm

(v) Defense counsel failed to get or even try to obtain a listing of potential State witnesses or known or understand who would be presented as evidence against the Petitioner.

While a list of the State's prospective witnesses was not obtained, counsel was otherwise aware of most, if not all, of the witnesses the State called or were prepared to call. No prejudice has been shown.

(e) Defense counsel made rambling, incoherent, and self-deprecating opening and closing statements, and not only failed to argue any facts or theories potentially helpful to the Petitioner, but in addition reinforced and reargued the theories and facts actually helpful to the Prosecution.

I have reviewed counsel's opening and closing statements and would note that every attorney has his own style and manner of presentation. Counsel's style of presentation does not constitute ineffective assistance of counsel. I further find that the basic points or theories of Applicant's defense were presented to the jury by counsel.

(f) Defense counsel failed to present for the defense and to cross-examine for the State witnesses during the trial of the case in a manner consistent with lawyers competent to practice criminal law.

Applicant has presented numerous expert witnesses in the field of criminal law. These witnesses testified concerning how they would have conducted Applicant's case. It is, however, mere speculation and conjecture, to assert that a different approach would have been more effective in this case. The manner in which an attorney questions and cross-examines witnesses is, like opening and closing statements, to a great extent a matter of personal style. I find no ineffective assistance of counsel as regards the presentation of defense witnesses and the cross-examination of the State's witnesses.

(g) Defense counsel failed to research the law of the State of South Carolina, the Fourth Circuit Court of Appeals, or the United States of America which was applicable to criminal trials in general and capital cases in particular, so that defense counsel was essentially ignorant of the law as it pertained to Petitioner's case throughout his entire guilt and mitigation trials.

The Applicant has not shown that a more recent or thorough review of any or all of these particular cases or the South Carolina Death Penalty Statute would have aided counsel in the preparation or presentation of his case. No prejudice has been shown. Furthermore, Mr. Louthian stated that he had read and reviewed the South Carolina Death Penalty Statute and a number of cases applicable to criminal trials in general, and capital cases in particular, prior to Applicant's trial.

(h) Defense counsel failed to take advantage of and utilize strategies which might be helpful to the Petitioner, and in particular failed to support the Petitioner's motion to relieve counsel, and have a mis-trial granted, and in addition, defense counsel undermined the Petitioner's position with the Court and jury by disassociating themselves from the Petitioner at every opportunity. While a different attorney might have employed a different strategy, the Applicant has not shown which strategies counsel failed to use or how, under the circumstances, a different trial strategy would have helped him. Applicant has failed to show how counsel disassociated themselves from him at every opportunity. Finally, while it might have been the better practice for counsel to support the Applicant's motion to have them relieved, Applicant has made no showing of prejudice from this failure. Mr. Stratos presented and joined in Applicant's first motion before Judge Eltzroth who upon questioning Applicant and Mr. Stratos, denied the motion. I find these allegations to be without merit.

(i) Defense counsel failed to discuss the case with Petitioner prior to or during trial in an effort to be able to provide adequate assistance.

This is not supported by the record. The testimony of Mr. Stratos and Mr. Louthian reveals that defense counsel discussed with Applicant his story as well as potential testimony at trial.

(j) Defense counsel failed to request any pre-trial motions of the Court. In particular, defense counsel failed to file the necessary motions to challenge legitimate constitutional defects in the South Carolina Death Penalty Statute and Capital Sentencing Procedures. Defense counsel failed to request any procedures on behalf of Petitioner or to file any other motions whatsoever. Other than motions to challenge legitimate constitutional defects in the South Carolina Death Penalty Statute and Capital Sentencing Procedures, Applicant has not stated with specificity which motions should have been made. Additionally, he has not demonstrated any prejudice resulting from the failure to make these motions. The South Carolina Death Penalty Statute and Sentencing Procedures have been held constitutional on several occasions, and Applicant can show no prejudice. The record reflects that the Solicitor made his file available to counsel, that counsel had an opportunity to examine the investigating officer under oath and that all police files and notes were provided to counsel.

(k) Defense counsel failed to request any charges to the jury concerning aggravating and mitigating circumstances.

Even so, Applicant has totally failed to show that any statutory aggravating circumstances were charged by the trial court which should not have been charged. He has also failed to show that any statutory mitigating circumstances were not charged which should have been charged. On direct appeal, our Supreme Court found "no evidence of probative value supporting applicant's contention that he was denied the effective assistance of counsel."

(l) Defense counsel failed to prepare Defendant for his testimony in the Penalty Phase of his trial.

The record reflects that counsel prepared Applicant to testify at both phases of his trial should it be needed. The record also shows that little last minute preparation was done to prepare Applicant to testify. The record additionally shows that counsel was unaware until the last minute whether Applicant would testify in his own behalf or not due to Applicant's last minute unilateral decision not to testify during the guilt phase of the trial.

(m) Defense counsel failed to investigate, develop, and present all available facts for mitigation of the punishment of the Petitioner and Defense counsel failed to contact appropriate character witnesses on behalf of the Petitioner in order to better explain the Petitioner to the jury at the sentencing trial.

A review of the testimony of the witnesses in mitigation shows that they presented, in a straight forward common sense manner, evidence in mitigation for the Applicant. The record reflects that counsel requested certain other family members to come and testify. They were also asked to bring other witnesses. Not only did these family members not bring additional witnesses, they failed to appear themselves. Based on the testimony presented, it appears that the testimony of most of these additional witnesses would have been substantially the same as that presented. Under the circumstances of this case, Applicant has failed to show any prejudice from the lack of a more thorough investigation.

(n) Defense counsel failed to represent Petitioner's interest as the "zealous advocates" required by law and in particular treated this case as they might an extremely minor criminal matter rather than the serious trial that it actually was. Defense counsel failed to recognize their own disdain for the Petitioner which was necessarily communicated to the jury and which was such that, at the very least, defense counsel should have withdrawn as counsel for the Petitioner.

This issue was presented to and decided by the South Carolina Supreme Court on direct appeal, and it is not properly before me. Even so, the contention that a more zealous advocate would have made a difference in the outcome of this case is pure speculation. There is nothing in the record to support the allegation that any disdain felt by counsel was communicated to the jury.

(o) Defense counsel failed to recognize the unique demands of defense counsel in capital cases and thereby failed to request and obtain the necessary assistance in order to try a case competently before a jury and in order to present the defendant's humanity to the jury and simply to be able to try the case properly.

Under the facts and circumstances of this case, I find this assertion to be without merit. Applicant has failed to show how any further assistance would have been of help to him or how the outcome would be changed if the case were tried differently.

(p) Defense counsel failed to recognize the unique seriousness of the Petitioner's case and thereafter failed to approach its demands with conscientious and serious resolve.

This assertion is unsupported by the record and is pure speculation and unsupported conjecture.

The Applicant's remaining allegations of ineffective assistance of counsel concern Judge Eltzroth's failure to further investigate Applicant's belief that Mr. Stratos was not "up on the law".

Ineffective Assistance of Counsel: Petitioner Hyman has been deprived of his right to effective assistance of counsel, in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution in that the Honorable Clyde Eltzroth refused to relieve D. J. Stratos as his trial counsel upon proper and timely motion of Petitioner.

(a) The Petitioner timely requested the removal of D. J. Stratos as his attorney in excess of three (3) months prior to the actual trial of the case.

(b) Judge Eltzroth failed to conduct any evidentuary inquiry into Petitioner's allegations that Mr. Stratos was not "up on the law".

(c) Judge Eltzroth failed to permit the Petitioner the opportunity to present the good cause underlying his request to relieve Mr. Stratos as his trial counsel.

Mr. Stratos was a member in good standing of the Charleston County Bar. After questioning the Applicant and Mr. Stratos, Judge Eltzroth apparently saw no need for further inquiry and denied the motion. To assure Applicant of competent representation, Judge Eltzroth ordered the Clerk of Court to appoint a lawyer to work with Mr. Stratos in the preparation and trial of Applicant's case. As I have found that Applicant received effective representation with the standards of Marzullo, this ground merits no further discussion.

After a thorough review of the entire record before me, as well as, a careful consideration of the arguments presented by the attorneys for the Applicant and the State, I conclude Applicant has failed to demonstrate any specific prejudice attributable to errors of omission or commission committed by trial counsel. Although Applicant presented many skilled criminal lawyers who testified in their opinion trial counsel was ineffective, Applicant's conviction and sentence were not the result of any deficiencies on the part of trial counsel.

Rather, the conviction and sentence were a result of the facts and circumstances of the crime. I find Applicant has failed to establish that trial counsel's representation fell outside the normal range of competency demanded of criminal lawyers, and accordingly, I find that trial counsel's representation was effective.

In conclusion, I find Applicant was afforded all of his constitutional rights. All grounds presented by the Applicant in his Application for Post-Conviction Relief, as amended, are dismissed.

AND IT IS SO ORDERED.

James M. Morris, Presiding Judge
of the Ninth Judicial Circuit

Manning, South Carolina
March 8, 1983

The Supreme Court of South Carolina

William Gibbs Hyman,

Petitioner,

v.

The State of South Carolina,

Respondent.

ORDER

William Gibbs Hyman has petitioned this Court for a writ of certiorari from the denial, after a hearing, of his application for post-conviction relief.

After careful consideration of this petition, we are of the opinion it should be denied.

C.J.
FOR THE COURT

Columbia, South Carolina

December 5, 1983

CERTIFIED TRUE COPY.
Deputy Clerk, S. C. Supreme Court

EXHIBIT A

The Supreme Court of South Carolina

January 10, 1984

Cuming B. Gibbs, Jr., Esquire
Messrs. Gibbs & Holmes
Post Office Box 1512
Charleston, South Carolina 29402

Re: William Gibbs Hyman v. State of South Carolina

Dear Mr. Gibbs:

The Court has this day refused your Petition for Rehearing in the above case in the following order:

"Petition denied.

s/ J. Woodrow Lewis C.J.
s/ Bruce Littlejohn A.J.
s/ J. B. Ness A.J.
s/ George T. Gregory, Jr. A.J.
s/ David W. Harwell A.J.

January 10, 1984."

The remittitur is being sent down today.

Very truly yours,

CLERK

CWD,Jr/spr

cc: Ms. Ann M. Stirling
John L. Sweeny, Esquire
The Honorable Donald J. Zelenka

ORIGINAL

83-6397

RECEIVED
MAR 10 1984
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

NO. _____

WILLIAM GIBBS HYMAN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

MOTION FOR LEAVE TO PROCEED

Petitioner, William Gibbs Hyman, respectfully moves this Court for leave to proceed herein in forma pauperis, in accordance with the provisions of Title 28, United States Code, Section 1915, and Rule 46 of this Court. The affidavit of petitioner in support of this motion is attached hereto. At all times in the State Courts, he was deemed indigent.

Presented herewith is a Jurisdictional Statement of the moving party.

Respectfully submitted,

COVINGTON GUESS, JR.
217 King and Queen Bldg.
145 King Street
Charleston, SC 29402
Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO. _____

WILLIAM GIBBS HYMAN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

AFFIDAVIT OF WILLIAM GIBBS HYMAN

IN SUPPORT OF MOTION TO

PROCEED IN FORMA PAUPERIS

I, William Gibbs Hyman, being first duly sworn, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? NO

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. _____

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. March 1979 $1,200/mo

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? NO

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

_____

3. Do you own any cash or checking or savings account? NO.

a. If the answer is yes, state the total value of the items owned. _____

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? NO.

a. If the answer is yes, describe the property and state its approximate value. _____

5. List the persons who are dependent upon you for support and state your relationship to those persons. N/A

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

William Gibbs Hyman
William Gibbs Hyman

SWORN TO and subscribed before me
this 6th day of March, 1984.

Notary Public for South Carolina
My Commission Expires: 4/26/89.

ORIGINAL

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO. 83-6397

WILLIAM GIBBS HYMAN,

PETITIONER,

vs

DANIEL R. McLEOD, SOUTH CAROLINA ATTORNEY GENERAL,

RESPONDENT.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

T. TRAVIS MEDLOCK
ATTORNEY GENERAL

DONALD J. ZELENKA
ASSISTANT ATTORNEY GENERAL

POST OFFICE BOX 11549
COLUMBIA, SOUTH CAROLINA 29211
803-758-2697

ATTORNEYS FOR RESPONDENT

PETITIONER'S QUESTIONS PRESENTED FOR REVIEW

I.

Was a claim of ineffective assistance made when a defendant shows: (1) That he did not receive representation within the range of competence demanded of attorneys in criminal cases; and (2) that counsel's failings impaired the presentation of his defense without regard to whether the outcome would necessarily have been different?

II.

Did the South Carolina Courts err in excluding at Petitioner's Post Conviction Relief trial the testimony of a juror who had been excused at trial for his opposition to the death penalty, and who was prepared to testify at the Post Conviction Relief trial that he could have considered imposition of the death penalty, and could vote to impose it, even though he was generally against the death penalty, but that he was never asked questions at trial which would have elicited these answers?

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO. 83-6397

WILLIAM GIBBS HYMAN,

PETITIONER,

vs

DANIEL R. McLEOD, SOUTH CAROLINA ATTORNEY GENERAL,

RESPONDENT.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

The Respondent, above named, prays that the Petition to review the judgment of the Supreme Court of South Carolina entered in the above styled case be denied.

OPINIONS BELOW

The opinions of the Supreme Court of South Carolina denying Petition for Writ of Certiorari to review the action of the Post Conviction Relief trial court judge, and in denying a rehearing on its decision to deny Petition for Writ of Certiorari are not reported. These decisions are appended to the Petition for Certiorari at 2A and 3A.

JURISDICTION

The opinion of the Supreme Court of South Carolina denying Petition for Writ of Certiorari was entered on December 5, 1983. A timely Petition for Rehearing was denied on January 10, 1984. This Court has apparent jurisdiction to review the judgment below pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are the Fourteenth, Fifth, Sixth, and Eighth Amendments to the United States Constitution. These provisions and the South Carolina Death Penalty Statute, Section 16-3-20, et seq., CODE OF LAWS (1976), as amended, are set forth verbatim in an Appendix to the Petition for Certiorari at page 7A.

COUNTER-STATEMENT OF THE CASE

This matter comes before this Court pursuant to a Petition for Certiorari from a denial of an application for post conviction relief in the South Carolina courts. The Petitioner was convicted of murder and armed robbery and sentenced to death. The background of the case reveals the following incidents. (PCR Tr. pp. 1526-1527). On the night of March 24, 1979, Petitioner Hyman and four other persons travelled from North Charleston, South Carolina, to the home of two elderly men, Teagus and Collins Griffis, in Ravenel, South Carolina. They intended to rob the home either by deception or violence. Hyman's wife, Doris, and Susan Allday knocked on the door of the trailer, but were unable to entice the men outside. Thereafter, the Petitioner, Allday, and Robert Hinson went back to the trailer door. It was opened by the occupants, and one of the Griffis brothers shot Hinson. A melee ensued and Collins Griffis was struck in the head several times, his blood was splattered throughout the trailer, and Teagus Griffis was shot in the chest with a shotgun and died. Hyman and the others were arrested and charged with murder and armed robbery on or about April 1, 1979. His family, through his brother, retained Mr. Demetrious J. Stratos to represent the Petitioner and his wife. Mrs. Hyman subsequently obtained other counsel.

On July 9, 1979, Judge Clyde Eltzroth denied a motion by Hyman to have Mr. Stratos relieved and requested the Clerk to appoint an additional attorney. On July 9, 1979, formal notice to seek the death penalty was made. Mr. Landon Louthian was finally appointed to represent him around July 24, 1979. Prior to trial, the Solicitor offered a plea bargain whereby the State would abandon its request for the death penalty in return for a guilty plea to murder. Each attorney met with the Petitioner and advised him that it would be in his best interest to plead guilty. The family was consulted and informed of counsel's advice to plead guilty. The Petitioner refused and the Court was informed. The case proceeded to trial on October 8, 1979, and Hyman was convicted of murder and armed robbery. On October 12, 1979, following a mitigation phase, the jury sentenced him to the death penalty.

The appeal was perfected to the Supreme Court. In its opinion, the Court made the following findings of fact and conclusions of law as they pertained to the issue of ineffective assistance of counsel:

> Appellant's claims are insufficient to show that justice was not done. He has not shown how counsel's alleged deficiencies affected the outcome of trial ... . We conclude there is no evidence of probative value supporting appellant's contention that he was denied the effective assistance of counsel. State v. Hyman, 281 S.E.2d 209, 213 (1981).

In the post-conviction proceeding, the crucial issue concerned the adequacy of counsel's representation. A review of the testimony of each attorney and the deposition set out the factual predicate for the resolution of the issue.

Mr. Stratos testified he was retained by the Petitioner's brother, Phillip Hyman, shortly after the Petitioner was arrested in April of 1979. (PCR Tr. p. 40).

Although Mr. Stratos did not own current volumes of the South Carolina Reports, South Carolina Digest, or Southeastern Reporter, etc., he had access to these books prior to the trial of this case. (PCR Tr. pp. 40, 242-243). Counsel testified that he did not now have a file on Hyman. (PCR Tr. p. 40). However, prior to trial, he obtained and reviewed various documents, statements, indictments arrest warrants, etc., and turned them over to co-counsel who maintained the file. (PCR Tr. pp. 41, 57, 69, 76, 252). Mr. Stratos testified he met with him at the county jail on numerous occasions and spent considerable time discussing with Petitioner the facts and circumstances surrounding his case. (PCR Tr. pp. 43, 51). Mr. Stratos testified that he did not visit Petitioner in jail from July 24, 1979, until October 1, 1979, but that he was well aware of the facts and circumstances of the case and did not obtain any new information when he visited Hyman on numerous occasions between October 1, 1979, to October 9, 1979. (PCR Tr. p. 103).

Mr. Stratos testified that based on the facts as related to him by Hyman and as discovered through his investigation he advised Petitioner to plead guilty to the crime of murder in exchange for a life sentence. (PCR Tr. p. 255). To this Hyman responded he would not plead guilty because he did not kill Teagus Griffis. (PCR Tr. pp. 49-51). Mr. Stratos testified he explained the theory "the hand of one is the hand of all" to Petitioner on numerous occasions. (PCR Tr. p. 258). Counsel spoke with and obtained statements from the State's primary witnesses, and he was present at Hyman's preliminary hearing. (PCR Tr. pp. 54-55). He testified that the Solicitor's file was available to him and that he reviewed it. Mr. Stratos testified he knew of the existence of Red Coulston, but

based on information given him by Hyman concerning criminal involvement between the two, did not feel Coulston would testify for the State. (PCR Tr. pp. 81-84). Mr. Stratos reviewed the statements of the State's primary witnesses with Hyman to help prepare him to testify as well as to convince him to plead guilty. (PCR Tr. p. 267). Counsel forwarded these statements to Hyman's family in the hope they would persuade Hyman to change his plea. (PCR Tr. p. 267). Mr. Stratos testified he spent a considerable amount of time prior to trial locating and attempting to locate defense witnesses to substantiate certain aspects of the Petitioner's story. (PCR Tr. pp. 268-269).

Mr. Stratos testified that in preparation for trial he went over the facts three to four hundred times and rehearsed his jury argument for many hours. (PCR Tr. p. 90). He obtained and reviewed the jury list prior to trial. (PCR Tr. pp. 94-96). Counsel testified his theory of the case was basically Hyman's and his wife's word against that of the other three accomplices on the issue of who the triggerman was. In furtherance of this, Mr. Stratos prepared the Petitioner to testify in his own behalf. (PCR Tr. p. 101). Counsel acknowledged that this theory was geared more for the sentencing phase of the trial than the guilt phase, as Hyman had no defense as to guilt. (PCR Tr. pp. 104-106).

Co-counsel Landon Louthian received notice of his appointment on July 24, 1979. (PCR Tr. p. 860). He telephoned Mr. Stratos and discussed background and the facts and circumstances surrounding this case. (PCR Tr. p. 861). Within a few days Mr. Louthian visited Petitioner in jail and discussed the case with him. Mr. Louthian testified that although he explained the "hand of one is the

hand of all" theory to Petitioner at least twice, Petitioner still refused to plead guilty. (PCR Tr. pp. 862-864).

Mr. Louthian met with a number of Petitioner's family members. (PCR Tr. pp. 864-865). Included among them were Becky Fain and Gracie Smith, two of Petitioner's sisters. He attempted to obtain support and assistance from them to mobilize the family in preparation for trial. (PCR Tr. p. 867). Counsel questioned various family members, as well as the Petitioner, concerning any prior emotional, drug or alcohol problems the Petitioner may have had, and it was at his suggestion that Petitioner was sent to the South Carolina State Hospital for evaluation. (PCR Tr. pp. 872-873).

Mr. Louthian talked with most, if not all, of the witnesses presented in mitigation prior to their testifying. (PCR Tr. pp. 874-877). He reviewed with them basically the areas he wished them to cover. Counsel testified he was prepared for and expected additional family members to testify during the sentencing phase. Mr. Louthian also expected various members of the family to bring additional witnesses such as neighbors, Petitioner's employer, etc., as they had informed him they "would see to it" these people were brought to Court. When these family members, as well as the additional witnesses, did not voluntarily appear in Court, Mr. Louthian testified he did not feel it would be in Petitioner's best interest to force these individuals to testify.

Mr. Louthian testified that he reviewed Petitioner's testimony and went over potential cross-examination with him. He felt Petitioner's only chance at both the guilt and sentencing phase of trial was for Petitioner to take the stand. (PCR Tr. pp. 870-873). (See: Hyman's sentencing testimony, App. Tr. pp. 464-475.)

In addition, counsel testified he discussed the case with various police officers and was aware of Collins Griffis' background and history through contact with a neighbor. Of much importance, he read the South Carolina Death Penalty Statute prior to the trial many times and did legal research. (PCR Tr. pp. 869-870).

REASONS FOR DENYING THE WRIT

This litigation concerns the collateral attack in the state court system of the representation received by a convicted murderer on death row in South Carolina since October 17, 1979. The Petitioner was represented by two counsel, one retained by his family and assisted by a later court-appointed counsel, who together adequately prepared the case for trial, but they were unsuccessful in avoiding the death penalty for their client. The state post conviction relief court found the following:

> Applicant has failed to demonstrate any specific prejudice attributable to errors of omission or commission committed by trial counsel ... . Applicant's conviction and sentence were not the result of any deficiencies on the part of trial counsel. Rather, the conviction and sentence were the result of the facts and circumstances of the crime. I find Applicant has failed to establish that trial counsel's representation fell outside of the normal range of competency demanded of criminal lawyers, and accordingly, I find that trial counsel's representation was effective. (App. pp. 4A, 44-45).

The issue as presented in this case must be determined to be narrow and unique in its facts. The legal issue surrounding his ineffective counsel claim is currently before this Court in Strickland v. Washington, cert. granted, __U.S.__, 103 S.Ct. 2451, 77 L.Ed.2d 1332 (1983) (No. 82-1554). This legal issue in the present case is no different than the hundreds of challenges to the effective counsel claims being

raised throughout the United States in state or federal courts pending the decision in Strickland v. Washington, supra. On the facts as presented to the South Carolina courts, the decisions below are clearly correct and in line with this Court's decisions concerning the constitutional right to counsel. No amount of rhetoric can convert it into one warranting review on certiorari. Manifestly, there is no important question of constitutional law requiring review by this Court.

His second issue before this Court concerns the exclusion of proffered testimony by a juror at the Petitioner's trial who had been excused for his opposition to the death penalty. The Petitioner merely seeks to re-open the record in cases and allow jurors who were struck for cause, properly on the record, to testify in later proceedings to impeach their original responses at trial. This was resolved solely as a matter of state evidence law and also does not justify review in certiorari nor present any federal question.

1. The Decision Below Gave Full Consideration To The Issues and Decided Them Correctly.

The lower court's decision rested upon the court's application of the "normal competency standard" set out in McMann v. Richardson, 397 U.S. 759 (1970). The lower court found that the asserted inactions of counsel were the result of informed professional deliberation rather than neglect or ignorance on each of the specific allegations raised. (PCR Tr. pp. 1541-1570). In this case, the court adopted a standard of prejudice whereby the petitioner was required to prove that the actions or omissions of his two counsel affected the outcome of his trial or the severity of his sentence. Clearly, no prejudice could be shown as affecting

the outcome of the trial because in the post conviction relief hearing the Petitioner testified that they were at the victim's home to try to get the "old men" to come out to "try to get money from them." (PCR Tr. p. 791). He further acknowledged hitting the living victim with the shotgun at least three times, though he continued to deny that he murdered Teagus Griffis as he did during his trial. (PCR Tr. p. 795). (Trial Tr. p. 469). The lower court specifically rejected each of the Petitioner's contentions against counsel by making adverse factual findings or legal conclusions. Whether or not the decision below was correct on the particular standard of prejudice, the Petitioner's arguments based upon the adverse factual findings are incorrect. This case simply does not merit review by this Court.

2. A Review By This Court Of The Second Issue Would Only Involve Questions Of Evidence Applied Under Familiar Legal Rules.

The second issue concerns the decision by the lower court to preclude the testimony of Manigault Jenkins, a juror struck for cause because of his unalterable opposition to the death penalty, in the post conviction relief hearing. During the trial, the juror advised the court that "I do not believe in the death penalty" and that he would automatically vote against the death penalty and that under no circumstances could he vote for the death penalty as a juror. (Trial Tr. pp. 601-602). The post conviction relief court disallowed his testimony proffer to show that he could have been rehabilitated in 1982. The court's rejection rested upon a sound basis that jurors cannot testify as to deliberations, impeachment of the verdict, or to contradict the record under South Carolina

law on evidence. In this unique and novel approach, Petitioner sought to re-open voir dire of jurors many years after the trial to determine if their attitude had changed (or could have been changed). (PCR Tr. pp. 408-504). Continued pursuit of the jurors' testimony would have had no bearing on any ground properly before the court as a matter of state law under the Uniform Post Conviction Procedure Act. Section 17-27-10, et seq., CODE OF LAWS (1976). The issue concerning the disqualification of a juror was a matter for direct appeal, not post conviction relief under state law. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1975). This is not an issue of constitutional law which deserves this Court's further attention.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be denied.

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April 6, 1984

STATE OF SOUTH CAROLINA)
) AFFIDAVIT
COUNTY OF RICHLAND)

PERSONALLY appeared before me, Donald J. Zelenka, Assistant Attorney General, who being duly sworn, deposes and says that he is a member of the Bar of this Court; that the Brief in Opposition to the Petition for Writ of Certiorari to the Supreme Court of South Carolina was deposited in the United States mail, first class postage prepaid, addressed to the Clerk, United States Supreme Court, 1 First Street, Washington, D. C. 20543, this 6th day of April, 1984.

DONALD J. ZELENKA

SWORN to before me this 6th
day of April, 1984.

(LS)
Notary Public for South Carolina
My Commission Expires: Jul. 8, 1991